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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1974

No. 74-1131

KALAMAZOO BOARD OF EDUCATION,
Petitioner,

[redacted]

vs.

MICHELLE OLIVER, by Her Father and Next Friend, ROBERT JONES; DAWN KIRK, STEPHEN KIRK and KIMBERLY KIRK, by Their Father and Next Friend, WYATT KIRK; LEAH ROBIN and PAUL ROBIN, by Their Father and Next Friend, STANLEY ROBIN; TIMOTHY SMITH, by His Mother and Next Friend, CAROL SMITH; LARISA MILLER and MARK MILLER, by Their Mother and Next Friend, KAREN MILLER; SCOTT ODOM, by His Mother and Next Friend, SUE ODOM; LISA MILLER, by Her Mother and Next Friend, MARGARET MILLER; STEPHEN PULASKI, LEAH PULASKI and MARK PULASKI, by Their Mother and Next Friend, EDITH PULASKI; JOHN FLYNN, DR. DONALD MAY and JOHN VAN ZOEREN, Parents, Are All Parents or Minor Children Thereof Attending Schools in the Kalamazoo Public School System; THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, KALAMAZOO BRANCH,
Respondents,

[redacted]

KALAMAZOO CITY EDUCATION ASSOCIATION, THE MICHIGAN EDUCATION ASSOCIATION and THE NATIONAL EDUCATION ASSOCIATION,
Respondents,

[redacted]

THE LEAGUE OF WOMEN VOTERS OF MICHIGAN and THE KALAMAZOO AREA LEAGUE OF WOMEN VOTERS,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit

(Signatures Appear on Inside Cover)

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OCTOBER TERM 1974

No.....

KALAMAZOO BOARD OF EDUCATION,
Petitioner,

vs.

MICHIGAN STATE BOARD OF EDUCATION, a Constitutional Body Corporate; JOHN W. PORTER, Superintendent of Public Instruction of the State of Michigan,
Respondents,

vs.

MICHELLE OLIVER, by Her Father and Next Friend, ROBERT JONES; DAWN KIRK, STEPHEN KIRK and KIMBERLY KIRK, by Their Father and Next Friend, WYATT KIRK; LEAH ROBIN and PAUL ROBIN, by Their Father and Next Friend, STANLEY ROBIN; TIMOTHY SMITH, by His Mother and Next Friend, CAROL SMITH; LARISA MILLER and MARK MILLER, by Their Mother and Next Friend, KAREN MILLER; SCOTT ODOM, by His Mother and Next Friend, SUE ODOM; LISA MILLER, by Her Mother and Next Friend, MARGARET MILLER; STEPHEN PULASKI, LEAH PULASKI and MARK PULASKI, by Their Mother and Next Friend, EDITH PULASKI; JOHN FLYNN, DR. DONALD MAY and JOHN VAN ZOEREN, Parents, Are All Parents or Minor Children Thereof Attending Schools in the Kalamazoo Public School System; THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, KALAMAZOO BRANCH,
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KALAMAZOO CITY EDUCATION ASSOCIATION, THE MICHIGAN EDUCATION ASSOCIATION and THE NATIONAL EDUCATION ASSOCIATION,
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THE LEAGUE OF WOMEN VOTERS OF MICHIGAN and THE KALAMAZOO AREA LEAGUE OF WOMEN VOTERS,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
for the Sixth Circuit

Petitioner Kalamazoo Board of Education, a constitutional body corporate, prays that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on December 9, 1974.

OPINIONS AND ORDERS BELOW

United States District Court for the Western District of Michigan, Southern Division

August 19, 1971, Opinion and Order for Preliminary Injunction, 346 F Supp 766. (A 1-32)

October 8, 1971, Opinion and Order Modifying Preliminary Injunction to Enjoin Teacher Terminations, 346 F Supp 766, 782 (A 33-43)

July 26, 1972, Opinion and Protective Order on Taking of Luff/Thompson Depositions, 346 F Supp 766, 787. (A 48-51)

August 9, 1972, Opinion and Order Denying Motion to Recuse, not reported. (A 124-139)

December 21, 1972, Order Denying Stay of Trial Date and Refusing to Rule on Motion to Dissolve Preliminary Injunction, not reported. (A 147-149)

January 19, 1973, Order Modifying July 26, 1972 Protective Order, not reported. (A 152-153)

February 24, 1973, Order Concerning Guidelines for Remaining Trial Preparation and Procedure, not reported.

April 3, 1973, Opinion and Order Denying Motion for More Definite Delineation of Plaintiff Class, not reported.

October 4, 1973, Opinion and Order for Permanent Injunction, 368 F Supp 143. (A 154-281)

November 2, 1973, Opinion and Order for Permanent Injunction, not reported. (A 282-284)

United States Court of Appeals for the Sixth Circuit

August 30, 1971, Opinion Affirming Preliminary Injunctive Order and Denying Stay, 448 F 2d 635.

January 5, 1973, Order Denying Petition for Writ of Mandamus, not reported. (A 150-151)

December 9, 1974, Opinion Affirming Final Order and Judgment for Permanent Injunction, not as yet reported. (A 285-323)

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on December 9, 1974. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 USC 1254(1).

QUESTIONS TO BE PRESENTED

I

Did the Court of Appeals err in finding the District Court's judgment was not void for want of due process in the proceedings below?

II

Did the Court of Appeals err in finding the District Court did not apply erroneous legal standards in determining the existence of a Constitutional violation?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution:

Amendments, Article V—"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendments, Article XIV, Section 1—"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statutes:

Section 803 of the Educational Amendments Act of 1972, Public Law 92-318. 20 USCA 1653—"Notwithstanding any other law or provision of law, in the case of any order on the part of any United States district court which requires the transfer or transportation of any student or students from any school attendance area prescribed by competent State or local authority for the purposes of achieving a balance among students

with respect to race, sex, religion, or socioeconomic status, the effectiveness of such order shall be postponed until all appeals in connection with such order have been exhausted or, in the event no appeals are taken, until the time for such appeals has expired. This section shall expire at midnight on January 1, 1974."

28 USCA 144—"Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding. The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith."

28 USCA 1292(a)—"The courts of appeal shall have jurisdiction of appeals from: (1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court."

STATEMENT OF THE CASE

Introduction

For brevity, clarity and convenience, Petitioner throughout the remainder of this petition will be called "KBE", Respondent

Plaintiffs will be called "Plaintiffs", and Respondents State Board of Education et al. will be called "SBE". This petition does not refer to the remaining Respondents. The facts will be divided as they relate to the question presented and in the order in which they are stated. As to each question, the facts will be presented in chronological order and their centrally essential aspects are italicized to enable the reader to more quickly relate them to the amplifying argument that follows. Where detailed facts can be more clearly understood as a part of the amplifying argument, they are omitted in the statement of the case with appropriate reference to the point where they are included in the amplifying argument.

I. **Denial of Due Process in Proceedings Below.**

Commencing on August 12, 1971, in its original and amended class action complaint, Plaintiffs claim SBE permitted and KBE acted to racially segregate its schools in 1970 and before, and resegregated schools thereafter by adopting on May 7, 1971, and rescinding, in effect, on July 6, 1971, a plan to desegregate its school system. On August 12th the District Court entered its temporary restraining order, and, eight days later, after a two-day hearing, entered its preliminary injunctive order. This order voided the July 6th resolution and ordered the May 7th racial balance plan implemented. *346 F. Supp766.* The Sixth Circuit affirmed this preliminary injunctive order at *448 F 2d 635. In both the preliminary injunction hearing and order the District Court unmistakably exhibited personal bias.* It is necessary to summarize and examine the facts which form the basis for this assertion as a part of the subsequent argument amplifying the reasons relied upon for the allowance of this writ, and they are not, for this reason, further set forth and authenticated at this point.

With the failure of repeated millage elections and without sufficient funds to operate without drastic change, KBE noticed

for termination 103 probationary teachers, including 26 black teachers, in order to keep its schools open the hours and days annually required by law. Plaintiffs moved to enjoin these terminations and on October 7, 1971, after a three-day hearing, the District Court ordered this relief. Subsequently voted millage, in an election made possible by special legislation, mooted the order and the relief provided by it.

On November 23, 1971 the court entered its first pre-trial order requiring the parties, among other things, to file a stipulation of all undisputed and undisputable fact as a condition precedent to trial on the merits. The parties commenced the discovery necessary to ultimately comply with this order and, as a part of such compliance, KBE noticed the pre-trial depositions of adverse majority board members, including Edward Thompson and Andrew Luff, the two who had made and seconded the motions calling for and adopting the May 7th racial balance plan. Plaintiffs promptly moved to protect these, their two most important and sympathetic witnesses, from depositionary discovery. To protect these crucial and adverse witnesses from nothing more fundamental than the annoyance and embarrassment which telling the full truth on discovery might entail, the District Court initiated and stubbornly pursued, totally without basis, an attack on the ethical position of KBE's long time counsel (the Ford Firm), and on July 26, 1972, ruled the depositions could not be taken by this firm, KBE's counsel of choice. (A48-51) *In the proceedings preliminary to this ruling and in the language of the ruling itself, the District Court unmistakably exhibited personal bias, and the order itself deprived KBE of its right to its counsel of choice.* It is necessary to summarize and examine the facts which form the basis for this assertion as a part of the subsequent argument amplifying the reasons relied upon for the allowance of this writ, and they are not, for this reason, further set forth and authenticated at this point.

Now convinced the District Court held such deep and personal prejudice against it and for black Plaintiffs it could not possibly

have a fair trial in these proceedings, KBE filed on August 2, 1972 its motion for recusal with the required supporting affidavit and certificate. (A52-123) On August 9th the District Court entered its order denying KBE's recusal motion. (A124-139) *Neither the District Court in denying nor the court of appeals in affirming its denial of the recusal motion followed the decision of this Court, and the District Court was, on the basis of the recusal motion and affidavit, without lawful authority to proceed further in the proceedings.* The reasons for this assertion are, of course, set forth more fully in the subsequent amplifying argument.

On August 21, 1972 KBE filed its motion to dissolve the preliminary injunction, basing its motion primarily upon the statutory language of *Section 803 of the Educational Amendments Act of 1972*, which became effective July 1, 1972, and attempted to provide a procedure for staying racial balance court orders. The District Court procrastinated and delayed the hearing on this motion, and on November 7, 1972, in contradiction to all of its prior pre-trial orders and the present progress and state of discovery, proceeded to manipulate and accelerate trial date on the merits so as to enable it to moot and avoid ruling on the motion to dissolve. On December 4, 1972 KBE moved specifically for a ruling on its motion to dissolve, and on December 21, 1972 the District Court entered its order refusing to rule. (A147-149) *By these maneuvers, the District Court further demonstrated its personal bias. It further denied KBE of its constitutional right to a hearing on its possible rights to stay under Section 803 and equal right to interlocutory appeal.* The reasons for this assertion are, of course, set forth more fully in the subsequent amplifying argument.

Promptly thereafter KBE filed a petition for mandamus or prohibition with the Sixth Circuit Court of Appeals, and on January 12, 1973 this court denied the petition, holding the matters asserted therein must await review on appeal from final judgment. (A-150-151)

Left now without further alternative, KBE proceeded promptly to complete its preparation for trial on the merits. On receipt of the mandamus order, it noticed board member depositions and employed supplemental counsel to take them. After the depositions were noticed and counsel employed, the District Court attempted to moot the due process error in its protective order which now had been made clear by the mandamus petition. It did so by voluntarily modifying its protective order so as to permit counsel of choice to take board member depositions, including those of Luff and Thompson, *subject*, however, to an important proviso, i. e., that the depositions be taken *only* in the District Court's presence, a situation, because of his absence, not possible, the court advised, until *one week* before the commencement of trial. (A 152-153) *The District Court, by its modification order did: (1) acknowledge, by implication, the due process error in its original protective order and its denial of KBE's right to counsel of choice for seven months critical and crucial to it in the preparation of its defenses; (2) attempt to moot the appealability of its original protective order after it had first expressly relied upon it as a basis for refusing recusal and excusing its own personal bias.* The reasons for this assertion are, of course, set forth more fully in the subsequent amplifying argument. Under these conditions, KBE took the deposition by additional counsel as scheduled and the deposition was offered by Plaintiffs and received, over KBE's objection, in evidence at trial.

The trial on the merits was completed and the District Court entered its final order and judgment for permanent injunction on November 2, 1973. (A 282-284) Appeals were taken from the final order and judgment, and on December 9, 1974 the Sixth Circuit Court of Appeals decided and filed its opinion affirming the final order and judgment of the District Court. (A 285-323) The opinion was not unanimous and Judge Weick filed a dissent based largely on lack of due process in the proceedings below. (A. 302-323)

II. Erroneous Legal Standards as Applied by the District Court and Affirmed by the Court of Appeals.

This issue involves no facts that do not derive from the opinions of the District Court and Court of Appeals, all of which are more understandable if presented as a part of the argument on said issue.

III. Historical and Background Facts Leading to the Commencement of This Litigation.

Such facts are not, strictly speaking, necessary to a consideration of the matters and reasons asserted in this Petition. However, they should be beneficial to this Court and they have been appropriately summarized near the end of this Petition so as not to interfere or interrupt, at this point, with the orderly presentation of the issues which are of first importance. The intent is to make such facts available, to urge that they be read and considered, but to be certain they do not confuse rather than clarify the central thrust of this Petition.

IV. Basis for District Court Jurisdiction.

Jurisdiction of the District Court in the first instance was invoked under 28 USCA 1331(a); 1343(3) and (4), and under 42 USCA 1983, 1988 and 2000(d). Jurisdiction for declaratory judgment relief as prayed for in the complaint was also invoked under 28 USCA 2201 and 2202.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals Has Sanctioned Proceedings in the District Court Which Not Only Departed From the Accepted and Usual Course of Such Proceedings, But Deprived KBE of Its Constitutional Rights to Due Process in at Least Four Separate Respects, i.e., Right to Trial Before an Impartial Tribunal, the Right to Use of Its Counsel of Choice, the Right to Be Heard on All of Its Claims and Defenses, and Equal Right to Interlocutory Appeal.

The fundamental issue before the Court of Appeals was the validity of the District Court's judgment for want of due process in *all* and *every* aspect of the proceedings below. If due process was denied in *any* respect in these proceedings, the judgment is void and must be reversed as a matter of law. The Court of Appeals erred in two material respects: *First*, it limited its consideration to a single aspect of the proceedings below, i.e., the legal sufficiency of the recusal affidavit, and then did not follow the applicable decision of this Court in making this determination. *Second*, it limited its consideration *solely* to the sufficiency of the recusal affidavit and ignored *other* aspects of the proceedings below which were not only additional evidence of personal bias but were *independent denials of due process* which rendered the judgment void. Each error will be separately and consecutively treated. Reasons will be separately stated, numbered and presented in logical sequence with the central thrust of each reason summarized in the first paragraph.

A. First error:

There are five interrelated reasons which KBE asserts as a basis for its claim the Court of Appeals did commit the first error.

1. A recusal affidavit must show the existence of bias. The existence of bias is shown if the affidavit gives fair support to the charge the District Court showed a *bent of mind* that *might prevent* or *impede* impartiality of judgment. A tribunal must not only *be* impartial but must give *assurance* of its impartiality.

These principles have been clearly established by this Court in *Berger v. United States*, 255 US 22, 41 S Ct 230, 65 L Ed 481 (1920). In determining and finding a recusal affidavit legally sufficient, the court in *Berger* at 41 S Ct 230, at 233 said:

> "Of course the reasons and facts for the belief the litigant entertains are an essential part of the affidavit, and must give *fair* support to the charge of a *bent of mind* that *may prevent or impede* impartiality of judgment." (Emphasis supplied.)

In describing the purpose of the congressional enactment permitting recusal on the filing of an affidavit (28 USCA 144) the court in 41 S Ct at 234 said:

> "Nor is it our function to approve or disapprove it, but, we may say, that its solicitude is that the tribunals of the county shall not only *be* impartial in the controversies submitted to them but shall give *assurance* that they are impartial, free, to use the words of the section, from *any* 'bias or prejudice' that *might* disturb the *normal* course of *impartial* judgment." (Emphasis supplied.)

In *In Re Murchison*, 349 US 133, 75 S Ct 623, 99 L Ed 942 (1955), this Court reversed a contempt conviction made by a judge acting as a one man grand jury. In 75 S Ct at 625 this court said:

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of

> *actual* bias in the trial of cases. But our system of law has always endeavored to prevent *even the probability* of unfairness." (Emphasis supplied.)

In *Offutt v. United States*, 348 US 11, 75 S Ct 11, 99 L Ed 11 (1954), this Court reversed a summary contempt conviction where the district court had become personally embroiled with an attorney charged with contempt during trial, stating in 75 S Ct at 13:

> "These are subtle matters, for they concern the ingredients of what constitutes justice. Therefore, *justice must satisfy the appearance of justice.*" (Emphasis supplied.)

2. A recusal affidavit must show that the *source* of bias was personal and not judicial, i.e., that it was based on *something more* than mere adverse rulings, and that it stemmed from *something other* than information produced in the proceeding.

These principles have been laid down by this Honorable Court in *Ex Parte American Steel Barrel Co.*, 230 US 35; 33 S Ct 1007; 57 L Ed 1379 (1913) *Berger v. United States* (supra), and in *United States v. Grinnell Corp.*, 384 US 563; 86 S Ct 1698; 16 L Ed 2d 778 (1966). In examining a court of appeals order replacing a district judge who had recused on the basis of a recusal affidavit, this Court in *Ex Parte American Steel Barrel Co.* (supra), 33 S Ct at 1010 said:

> "The basis of the disqualification is that 'personal bias or prejudice' exists, by reason of which the judge is unable to impartially exercise his functions in the particular case. It is a provision obviously not applicable save in those rare instances in which the affiant is able to state facts which tend to show *not merely adverse rulings* already made, which may be right or wrong, *but facts and reasons which tend to show personal bias or prejudice.* It was never in-

> tended to enable a discontented litigant to oust a judge because of adverse rulings made, for such rulings are reviewable otherwise, but to prevent his future action in the pending cause." (Emphasis supplied)

This Court in *Berger v. United States* (supra), 41 S Ct at 232 characterized the holding in *Ex Parte American Steel Barrel Co.* with this language:

> "The case establishes that the bias or prejudice which can be urged against a judge must be based upon *something other* than rulings in the case." (Emphasis supplied)

In *United States v. Grinnell* (supra), this Court affirmed lower court findings that a recusal affidavit was insufficient when it was based solely upon information the district court had learned from discovery in the case which he had, in advance of trial, specifically been requested to examine. Citing *Berger*, this Court in 16 L Ed 2d 793 stated:

> "The alleged bias and prejudice to be disqualifying must *stem* from an *extrajudicial* source and result in an opinion on the merits on some basis *other than what the judge learned from his participation in the case*. Berger v. United States, 255 US 22, 31, 65 L Ed 481, 484, 41 S Ct 230. Any adverse attitudes that Judge Wyzanski evinced towards the defendants were based on his study of the depositions and briefs which the parties had requested him to make. What he said reflected no more than his view that, if the facts were as the Government alleged, stringent relief was called for." (Emphasis supplied)

3. Personal bias may be evidenced by any act or utterance, and it is not "judicial" bias simply because it is *exhibited* during the proceedings.

In *Berger v. United States* (supra), the personal bias was evidenced by the judge's comments made during the earlier sen-

tencing of a different defendant convicted of identical or similar offense. In *Cooke v. United States*, 267 US 517; 45 S Ct 390; 69 L Ed 767 (1925), the evidence of personal bias arose from the court's handling of a contemptuous letter written by counsel after an adverse ruling. In reversing a summary conviction for lack of due process, this Court ordered another judge assigned because of "marked personal feelings" evidenced solely by remarks made by the judge in the course of his handling of the contempt proceeding. In *Peckham v. United States*, 210 F 2d 693 (CA DC, 1953), a conviction after trial by jury was reversed and remanded for new trial solely on evidence of personal bias exhibited by the trial court during the trial itself, and in *Offutt v. United States* (supra), a contempt conviction against the counsel for defendant in *Peckham v. United States* (supra) was reversed and remanded for determination before another judge, again based upon evidence of personal bias exhibited solely during the trial itself. These principles are evidenced in the various circuits. They are best illustrated in *Knapp v. Kinsey*, 232 F 2d 458 (CA 6, 1956) and *Wolfson v. Palmieri*, 396 F 2d 121 (CA 2, 1968). In *Knapp v. Kinsey* (supra) the evidence of bias was derived solely from comments and conduct of the court during the trial. At Page 465 the court stated:

> "Bias or prejudice on the part of a judge may *exhibit* itself *prior* to the trial by acts or statements on his part. Or it may *appear during the trial* by reason of the actions of the judge in the conduct of the trial. If it is known to exist before the trial it furnishes the basis for disqualification of the judge to conduct the trial." (Emphasis supplied)

and at Page 466 the court stated:

> "When the remarks of the judge *during the course of a trial*, or his *manner of handling the trial*, clearly indicate a hostility to one of the parties, or an unwarranted prejudgment of the merits of the case, or an alignment on the part of the Court with one of the parties for the purpose of

> furthering or supporting the contentions of such party, the judge indicates, whether consciously or not, a personal bias and prejudice which renders invalid any resulting judgment in favor of the party so favored." (Emphasis supplied)

The Sixth Circuit in *Knapp* clearly recognized the distinction between personal and judicial bias, and yet reversed a trial court judgment based solely upon evidence of bias which had been exhibited during the trial itself.

Rarely can the actual source of bias be identified. It need not be. All that is required is that it stem extrajudicially, and it may *stem extrajudicially though it be exhibited* solely within the proceeding. After recognizing bias must be personal and not judicial and after having defined judicial bias, the Second Circuit in *Wolfson v. Palmieri* (supra) said at Page 124:

> "The Supreme Court has stated that: 'The alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case.' United States v. Grinnell Corp., 384 U.S. 563, 583, 86 S. Ct. 1698, 1710, 16 L.Ed. 2d 778 (1966). *On the other hand, to establish the extrajudicial source of bias and prejudice would often be difficult or impossible and this is not required. Comments and rulings by a judge during the trial of a case may well be relevant to the question of the existence of prejudice.*" (Emphasis supplied).

In distinguishing personal from judicial bias, this Court points out the principal reason judicial bias is insufficient is that it can be corrected by the usual appellate remedies. It is perhaps important to note the extent to which those remedies do in fact exist and the extent to which they have been altered or destroyed subsequently by the action of the District Court itself. As to the preliminary injunctive order, interlocutory

remedies, of course, did exist and were exercised. As to the order refusing to rule on the motion to dissolve, interlocutory appeal of right either did not exist or at best was most doubtful. Clearly this order could not be reviewed by writ of mandamus and it became mooted by mere passage of time before it could possibly be reviewed on appeal of right from final judgment. But the full dimensions of the District Court's use and abuse of appealability of a merely adverse order as a basis for denying its recusal is demonstrated by the protective order. The District Court expressly relied on the mere adversity and appealability of this order to shield its bias in refusing recusal in July. Then after having used the order's appealability for this purpose in July, the District Court then proceeded to moot or attempt to moot the very appealability it had relied upon in July by modifying the protective order in December. It would be difficult to imagine judicial action more capricious or unfair.

4. The recusal affidavit filed in this cause sets forth facts and reasons other than mere adverse ruling which *did not* and *could not* have stemmed from information produced in the proceeding. These undisputed and undisputable facts do not *by any possible construction* reconcile with District Court impartiality in fact nor could they possibly give the assurance or appearance of impartiality.

The recusal affidavit asserted that the District Judge had in his preliminary injunctive opinion used dramatically sympathetic language to describe black Plaintiffs (innocent young children, permanently, devastatingly and irreparably harmed). It asserted that this attitude, of necessity, was indicative of his equally hostile attitude towards KBE. It asserted that the laudatory terms the District Court used, without necessity or evidence, to describe persons supporting Plaintiffs' cause (conscientious, sincere, publicly dedicated, self-sacrificing men with courage to bite the bullet), were indicative of personal bias. It asserted, on the other hand, the District Judge's bias and hostility towards

KBE was evidenced by an unnecessary finding concerning its motives in discharging its superintendent, Dr. Cochran, and by its unnecessary finding, without evidence, concerning him, to be a "dedicated public servant", solely because of his support for Plaintiffs' cause. It asserted the District Judge's bias towards KBE was also evidenced by his unnecessary attack on its counsel in finding, without evidence, erroneous advice had been given on a question which had not even been asked. The affidavit alleged and established that all of this bias *did not* and *could not* have stemmed from evidence adduced in the proceeding. The affidavit itself alleged that the deep sympathy for black Plaintiffs could not have stemmed from information produced in the proceedings because a similar attitude did not exist for poor white children, who, by identical evidence, were in comparably disadvantaged circumstances.

The affidavit asserted that the Disrict Court had, in order to protect Plaintiffs' two most important and sympathetic witnesses (Luff and Thompson) from the *annoyance* of telling the truth on depositionary discovery, launched, *on its own initiative*, an attack on the ethical position of the Ford Firm, KBE's long time counsel of choice, not only to take the depositions but to even be and continue in the litigation. It asserted the strength of this attitude, all without evidence, was shown by the District Court's own words: "I can't conceive how you can be in this position". The affidavit further asserted this attack continued even *after* the ethical position of the Ford Firm had been found clearly proper by an appropriate ethics committee of the Michigan State Bar, when the District Court did, in the arguments on a second hearing it had called on the motion for protective order, openly and actively argue against the ethical position of the Ford Firm, repeatedly asking, in the course thereof, interruptive and leading questions, all for the purpose of establishing, by admission of counsel, the facts which would enable it to rule their position unethical. The affidavit further asserts the District Court did, in disregard of the ethics opinion,

rule that the depositions could not be taken by the Ford Firm, and did in its opinion describe the Ford Firm as "attorneys turned inquisitors" for attempting to take the depositions which they should have avoided had they "a due respect for civility". The affidavit also asserts the District Court could not deprive KBE of its *right to counsel of choice* for no better reason than to protect the favorable witnesses of Plaintiffs from the *embarrassment* involved in *truth disclosure* on discovery without personal bias for black Plaintiffs and against KBE. It also asserted the District Court could not, in order to protect Plaintiffs' witnesses from essential truth discovery, initially attack the ethical position of KBE's counsel and then paradoxically by its order *commit* them to an unethical position of divided loyalty, in itself violative of his own canons of judicial ethics, without personal bias for and against the respective parties. The affidavit also asserts the attack on the ethical position of the Ford firm *did not* and *could not* have stemmed from information produced in the proceeding because it was initially based upon *assumed facts* which did not and had *never existed*, and it was zealously pursued *in spite* of the information produced in the proceeding which proved this firm's position was not unethical. The District Judge's own words established the existence of personal bias; his own acts have established the extent to which it not only *might* but *has* prevented him from acting impartially in this cause.

5. The District Court had power to pass upon the sufficiency of the recusal affidavit as to the existence and source of bias, but if it was sufficient as to each, then the District Court had no lawful power, as a matter of law, to continue in the case.

This Court in *Berger v. United States* (supra) made this proposition crystal clear when it answered three specific questions which had been certified to it. Its answers in 45 S Ct at 234 are as follows:

> "We come then to the questions certified and to the first we answer, Yes; that is, that the affidavit of prejudice is

> sufficient to invoke the operation of the act. To the second we answer that to the extent we have indicated, Judge Landis had a lawful right to pass upon the sufficiency of the affidavit. To the third we answer, No; that is, that Judge Landis had no lawful right or power to preside as judge on the trial of defendants upon the indictment."

It is submitted the recusal affidavit, if tested in accordance with the applicable decisions of this Court, was legally sufficient as a matter of law. This being true, the District Court was, as a matter of law, without power to continue in the case. The District Court's failure to recuse in response to the affidavit has deprived KBE of its right to an impartial tribunal and this alone, as a matter of law, invalidates the final judgment rendered on the merits.

Circuit Judge Weick described the proceedings which have taken place in this case in this language:

> "What happened is unprecedented in school desegregation litigation." (A-302)

In the next 20 pages Judge Weick reviews in complete detail the proceedings below, and in finding KBE was denied a fair trial and entitled to reversal and remand before a new judge, he aptly summarizes the matter as follows:

> "The Board of Education, representing 17,285 school children, was entitled to better treatment than it received in this case. Under our Constitution even the most despicable person charged with a heinous crime is entitled to a fair trial."

B. **Second Error.**

There are four interrelated reasons which KBE asserts as a basis for its claim the Court of Appeals committed its second error.

1. The protective order was not merely an erroneous adverse ruling; it was, in itself, a denial of due process because it denied KBE of its constitutional right to use of counsel of choice in crucial aspects of trial preparation.

The District Court ruled the Luff/Thompson depositions were appropriate and recognized the central role each played in the matter contested and the likelihood of their appearance as witnesses in the trial of the cause. It also ruled the Ford Firm had violated no ethical rules and should remain in the case and try the cause. It then ruled the Ford Firm could not, however, take the Luff/Thompson depositions, and that these should, instead, be taken by other attorneys in the Kalamazoo area.

This ruling denied KBE of its constitutional right to use counsel of its choice in the taking of these critical depositions. The right to counsel is an essential due process element of any hearing. This was established by this Court in *Powell v. Alabama*, 287 US 45, 53 S Ct 55, 84 ALR 527, 77 L Ed 158 (1932). The court in *Powell* traced the historical existence and development of the right to counsel in civil and criminal cases and summarized its conclusions as to both civil and criminal cases with this language appearing at Page 540 of 84 ALR:

> "What, then, does a hearing include? Historically and in practice, in our own country at least, it has always included the right to the aid of counsel when desired and provided by the party asserting the right."

After then discussing the fundamental importance of the right to counsel to a fair hearing, the court on the same page states:

> "If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hear-

ing, and, therefore, of due process in the constitutional sense."

Powell was subsequently followed by *Chandler v. Fretag*, 348 US 3, 75 S Ct 1; 99 L Ed 4 (1954), and in *Reynolds v. Cochran*, 365 US 525, 81 S Ct 723, 5 L Ed 2d 754 (1961). In following *Powell* each cited the specific language above quoted.

Powell establishes not only the right to counsel but the right to *counsel of choice*, when at Page 532 of 84 ALR the court states as follows:

> "It is hardly necessary to say that the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel *of his own choice*." (Emphasis supplied)

This holding was also applied in *Chandler* and *Reynolds*.

In *Powell* the trial court had appointed all members of the local bar as counsel for defendants and had allowed an out of state counsel to assist, but had never specifically advised defendants of their right to counsel of choice nor afforded them an opportunity to obtain such counsel. In *Chandler* defendant was charged with being a habitual criminal and made timely request for a continuance so as to obtain the assistance of his counsel of choice. The trial court denied his motion. In *Reynolds* defendant was charged under Florida's multiple offenders' statute and was convicted after the trial court had denied his request for delay until his attorney, who was enroute, would arrive and assist him in the proceeding. In each case convictions were reversed.

Powell also established that the right to counsel means the right to have counsel present *at all critical stages of the proceedings*. At Page 534 of 84 ALR the court says:

> "In any event, the circumstance lends emphasis to the conclusion that during perhaps the most critical period

> of the proceedings against these defendants, *that is to say, from the time of their arraignment until the beginning of their trial, when* consultation, *thorough going investigation and preparation were vitally important,* the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself." (Emphasis supplied)

The critical character of the Thompson deposition is undeniably demonstrated by the use ultimately made of it. Plaintiffs offered the deposition and it was received over KBE's specific objection based upon the District Court's protective order as made and modified. The Thompson deposition was not only so offered but was relied upon by the District Court as the sole proof that KBE's boundary and construction policies had left the "old schools" for black children. The comparative age and condition of physical facilities is an important factor in a case of this kind. This Court pointed out in *Green v. County School Board of New Kent County*, 391 US 430, 88 S Ct 1689, 20 L Ed 2d 716, at 722 (1968) physical facilities was one indicia, among others, of a segregated system. The importance of having the Thompson deposition taken by KBE's regular counsel who was intimately informed about the schools, and the nearly 2,000 exhibits generated in preparation of the case, is demonstrated by the fact Thompson's testimony on this point is totally erroneous and its error could have been demonstrated when the deposition was taken through use of a single exhibit. (Plaintiffs' Exh. 308). Thompson's testimony could have been changed or impeached had he been confronted with the uncontradictable evidence contained in this exhibit alone. Instead of old schools for black children, this exhibit showed the five schools containing the most black children to have an average age of 38.6 years, while the average age of the remaining predominantly white 1945 elementary schools had an average age of 48.4 years. It showed two black schools to be of 15 years of age or less and the average age of two others to be one year less

than the average age of the 7 predominantly white 1945 elementary schools. It showed the oldest "black" school, so-called (Roosevelt) to be no more than 12 years older than the oldest predominantly white school (Washington).

All of these fundamental principles were applied in *Roberts v. Anderson*, 66 F 2d 874 (CA 10, 1933), a civil case. In this case plaintiff sought to quiet title to land in the United States District Court, and her heirship was the principal issue in this proceeding. This issue had been decided adversely to her in a previous proceeding in an Oklahoma probate court. This adverse ruling settled the issue in the district court unless the judgment rendered by the probate court was void for lack of due process. The district court found lack of due process in the probate hearing solely because plaintiff had been denied assistance of counsel of her choice and this finding was affirmed by the Tenth Circuit. In affirming, the court of appeals specifically cites *Powell* as authority for the proposition that the right to hearing includes the right to the assistance of counsel of choice, speaking at Page 876 as follows:

> "The right to a hearing includes the right to the assistance of counsel of his own choice, if requested. Cooke v. United States, 267 U.S. 517, 537, 45 S. Ct. 390, 69 L. Ed. 767; Powell v. Alabama, 287 U.S. 45, 53 S. Ct. 55, 64, 77 L. Ed. 158; 84 A.L.R. 527."

Based upon the fundamental principles of *Powell*, the court of appeals proceeded to analyze the probate court hearings specifically with respect to the right and use of counsel of choice. In the probate hearing plaintiff was represented by counsel of choice, but the probate court also appointed counsel who also participated in the proceeding. As to the contention this type of representation fulfilled plaintiff's constitutional right to counsel of choice, the court of appeals at Page 877 said:

> "The right to be represented by counsel is a substantial one, and means what it says. It does not mean that chosen

> counsel shall appear by permission of, or in subordination to, counsel appointed without warrant of law. The record in this case clearly discloses the confusion of tongues bound to arise when counsel of a person's choice is compelled to associate with counsel not so chosen."

The court of appeals summarized the situation in the probate hearing at Page 878 with this language:

> "We have then this situation: The county court denied Hanna the right to be heard through one counsel of her selection without reservation; it permitted her to be heard through other counsel of her selection only by permission of and in subordination to counsel whom she did not select and who constantly opposed her own counsel. There was forced upon her, without legal right, counsel appointed by the court. Such a hearing does not accord with those fundamental notions of substantial justice which due process demands."

As to the effect of the denial of plaintiff's due process right to use of counsel of choice in the probate proceeding, the circuit court of appeals spoke at Page 879 as follows:

> "We are of the opinion that the trial court followed the proper course; no valid determination of heirship being in existence when the cause was tried, it was its duty to decide the issues properly before it."

The right to counsel of choice in *civil* litigation is an *absolute* requirement of *rudimentary* due process even in a hearing where no more than *minimal* procedural safeguards are required, and this has been made crystal clear in *Goldberg v. Kelly*, 397 US 254, 90 S Ct 1011, 25 L Ed 2d 287 (1970). There this Court held the state and city of New York could not terminate payments to welfare claimants without an evidentiary due process hearing which met minimal safeguards required by rudimentary

due process. It found the right to employ and use counsel of choice to be such a rudimentary due process right. In 25 L Ed 2d at 300 this Court, as to the right to counsel, said:

> "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Powell v. Alabama, 287 US 45, 68-69, 77 L Ed 158, 170, 53 S Ct 55 (1932). We do not say that counsel must be provided at the pre-termination hearing, but only *that the recipient must be allowed to retain an attorney if he so desires.*" (Emphasis Supplied).

2. The proceedings on KBE's motion to dissolve before its order refusing to rule was made contained highly probative evidence of personal bias which could not have stemmed from information produced in the proceeding. This evidence demonstrates by example how the District Court's bias did and has prevented it from acting impartially.

The motion to dissolve was filed August 18, 1972, and was based in large part upon Section 803 of the Educational Amendments Act of 1972, 20 USCA 1653. This act, which had become effective July 1, 1972, attempted to provide relief from the court-ordered transportation of children for racial balance. It expired by its own terms, on January 1, 1974. Though KBE had specifically asked for all possible priority in determination of this motion, the District Court delayed and finally refused to decide it at all. The delay was accomplished by the District Court's failure to certify the constitutional question raised in the motion until October 16, 1972, though the need for such a certification was specifically called to the District Court's attention first on August 25, 1972 and again on September 13, 1972, specifically in each case to avoid delay. In order to avoid ruling and justify its refusal to rule on this motion, the District Court as its November 7, 1972 pre-trial, manipulated and accelerated the trial date on the merits. Prior to this pre-trial, the parties

were, under the guidance of the court, proceeding on a time schedule hinged to the completion of defendant Dr. Porter's deposition. The trial date was to be deferred at least 135 days after the completion of this deposition so as to enable the parties to complete the remaining discovery, prepare and depose expert witnesses, and prepare the stipulations of undisputed and undisputable fact the court had ordered in its first pre-trial. This time schedule was proposed by the Plaintiffs and accepted by the court at the May 1, 1972 pre-trial. At the November 7, 1972 pre-trial, Plaintiffs in their discovery progress report advised that the Porter deposition had not been completed and it could not be completed until they had first searched SBE files in some 20 different categories going back in each some 25 years. As to this search Plaintiffs couldn't furnish even an estimate of the time for its completion. Disregarding this report and its previous time schedule, the District Court for the first time advised he wanted "to shoot for a December 4th trial date." Plaintiffs could produce neither their experts nor one of their counsel for trial on the date indicated and Defendants opposed putting their case in out of order, and on mutual request of all counsel trial date was ultimately deferred to February 15, 1973. All of these facts are undisputed and are a part of the record of this case.

3. The order refusing to rule was not merely an adverse ruling. It did, in itself, deprive KBE of its due process right to a hearing on its 803 rights, among others, asserted in the motion.

On December 4, 1972, KBE moved specifically for a ruling on its motion to dissolve, and on December 21, 1972 the District Court entered its order refusing to rule, indicating therein it was withholding consideration of the motion to dissolve until trial was had on February 15, 1973. Trial on the merits ended on May 21, 1973, and final judgment was not entered until November 2, 1973. The motion to dissolve was never even mentioned in the trial or final judgment. Since Section 803 by

its terms expired January 1, 1974, KBE has been totally deprived of a decision and thus a hearing on its motion to dissolve and any possible right it might have had to interim relief under Section 803.

A party has a constitutional right to be heard *sometime* on *every claim* or *defense*. In *Lindsey v. Normet*, 405 US 56, 92 S Ct 862, 31 L Ed 2d 36 (1972), this Court upheld an Oregon forcible entry and detainer statute which excluded lessor's defaults as defenses in lessor's actions for non-payment of rent, but it did so only after recognizing lessee had a due process right to be heard sometime on those and any other available defense or claim. The Court in 31 L Ed 2d at 46 said:

> "Due process requires that there be an opportunity to present every available defense. American Surety Co. v. Baldwin, 287 US 156, 168, 77 L Ed 231, 239, 53 S Ct 98, 86 ALR 298 (1932). See also Nickey v. Mississippi, 292 US 393, 396, 78 L Ed 1323, 1325, 54 S Ct 743 (1934)."

In *American Surety Co. v. Baldwin*, 287 US 156, 53 S Ct 98, 86 ALR 298, 77 L Ed 231 (1932), a surety had a possible defense on a judgment rendered against it on its appeal bond, but did not properly assert this defense procedurally. As to its constitutional right to assert this defense sometime, this Court left no doubt, speaking in 53 S Ct at 102 as follows:

> "In order to contest its liability, the surety company had the constitutional right to be heard at some time on the construction of the bond. The state practice provided the opportunity for such a hearing by an appeal after the entry of judgment."

Due process requires the right to assert a claim or defense at a *meaningful time* and in a *meaningful manner*. In *Armstrong v.*

Manzo, 380 US 545; 85 S Ct 1187; 14 L Ed 2d 62 (1965), a Texas adoption decree was voided where the natural parent had not consented and had no notice of the proceeding but had been afforded a hearing on a motion to set the decree aside. Finding the hearing on the motion to set aside insufficient, to satisfy due process requirements this Court at Page 66 of 14 L Ed 2d said:

> "A fundamental requirement of due process is 'the opportunity to be heard.' Grannis v. Ordean, 234 US 385, 394, 58 L Ed 1363, 1369, 34 S Ct 779. *It is an opportunity which must be granted at a meaningful time and in a meaningful manner.* The trial court could have fully accorded this right to the petitioner only by granting his motion to set aside the decree and consider the case anew. Only that would have wiped the slate clean. Only that would have restored the petitioner to the position he would have occupied had due process of law been accorded to him in the first place." (Emphasis supplied)

The right to be heard involves not only the right to a decision but the right to a decision based upon legal rules and on the evidence adduced. This is a fundamental due process right demanded by even rudimentary due process. In 25 L Ed 2d at 301 this Court in *Goldberg v. Kelly* (supra) said:

> "Finally, the decisionmaker's conclusion as to recipient's eligibility must rest solely on the legal rules and evidence adduced at the hearing. Ohio Bell Tel. Co. v. PUC, 301 US 292; 81 L Ed 1093; 57 S Ct 724 (1937); United States v. Abilene & S.R. Co., 265 US 274, 288-289, 68 L Ed 1016, 1022, 1023, 44 S Ct 565 (1924). To demonstrate compliance with this elementary requirement, the decision maker should state the reasons for his determination and indicate the evidence he relied on, cf. Wichita R. & Light Co. v. PUC, 260 US 48, 57-59, 67 L. Ed 124, 129, 130, 43 S Ct 51 (1922), though his statement need not amount

to a full opinion or even formal findings of fact and conclusions of law."

4. A right of interlocutory appeal from rulings on a motion to dissolve a preliminary injunction having been given all others, it is a denial of due process to refuse to rule on such a motion in order to circumvent this interlocutory right of appeal.

Appeal of right from an interlocutory decision granting, continuing, modifying, recusing or dissolving injunctions or refusing to dissolve or modify injunctions, exists by virtue of an express statutory provision. 28 USCA 1292(a) (1) provides as as follows:

"(a) The courts of appeal shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;"

KBE's motion to dissolve was filed in August. (A-140). It was fully briefed on its merits initially and supplementally by all parties. No party ever moved to strike it as sham or for any other reason. When the District Court had fully exhausted all possible reasons for delay in its determination, KBE filed a specific motion requesting it be ruled upon. (A-142). On December 21st the District Court refused to rule and asserted as its principal ground its desire to avoid right of interlocutory appeal KBE would have from its ruling. (A-147). Interlocutory review of a ruling on the motion to dissolve would have permitted interlocutory review of all prior interlocutory orders, including the earlier protective and recusal orders. In *Collier v.*

Hon. Frank A. Picard, 237 F 2d 234 (CA 6, 1956), the Sixth Circuit in a per curiam opinion at Page 235 stated:

> "The denial of a motion and affidavit of bias or prejudice filed under 28 U.S.C.A. § 144 can be reviewed *upon appeal of an interlocutory order which is appealable* or upon appeal from the final decision in the proceeding in which the motion and affidavit were filed. See Korer v. Hoffman, 7 Cir., 1954, 212 F. 2d 211, 213, 45 A.L.R. 2d 932."

While the right to appeal does not have the same constitutional dimensions as the right to counsel, it is clear once it is given to one it must be given to all on equal terms. Equal right of appeal as an essential part of due process is discussed in *16 Am Jur 2d* 585 as follows:

> "The state may prescribe rules as to appellate procedure. And no violation of constitutional law is involved in a court's insistence that a statutory right of appeal be exercised according to the lawful rules of the court. But such rules governing appeals must operate uniformly. A party otherwise entitled to appeal who, by the construction of a statute, is prevented from doing so, where such right is given to all others in similar cases, is thus deprived of the right of due process of law."

The District Court could not constitutionally deny KBE's interlocutory right of appeal from a ruling made on its motion to dissolve for its convenience, or for the convenience of the Court of Appeals or in order to avoid interlocutory appeal on its earlier recusal and protective orders. Due process rights do not exist for administrative convenience or expediency, and they cannot be denied for such reasons.

II. In Determining the Existence of Discriminatory Purpose and Intent, the Legal Standards Applied by the District Court and Affirmed by the Court of Appeals, Decided an Important and Fundamental Federal Question. The Standards Applied Decided This Question in Conflict With the Applicable Decisions of This Court.

A. The district court did, by its standards, decide an important federal question.

In defining its standards the District Court said:

> "The starting place is the standards and processes evolved by the common law for determining the relevant *state of mind* of the defendant, or defendants, in an intentional tort suit. In general, *it is reasonable to infer that pepole intend the natural and probable consequences of acts knowingly done or knowingly omitted.*" (Emphasis Supplied) (A-174)

The District Court summarized its standards as follows:

> "It is established that where an appropriate factual showing has been made, including a showing that an *existing segregated situation* is to a *significant* extent the *natural, probable and actual result* of the actions and inactions of the state and local agencies, the plaintiffs have laid an *evidentiary foundation* for the conclusion that the results, segregated schools, *were intended to be reached by these authorities.*" (Emphasis Supplied) (A-174-175)

"Knowingly done" as used by the District Court in setting forth its standards meant any act voluntarily done and not the result of mistake, accident or matters analogous thereto. Footnote 19 specifically so provides:

> "2 Devitt and Blackmar, supra note 16 at Sec. 74.03. The term 'other innocent reason' at the end of the final sen-

> tence refers in this context not to defenses in the area of causation or to such affirmative defenses as consent or self-defense, but rather refers to matters analogous to mistake or accident which would tend to negate knowledge or affirmative purpose." (A-174)

"Segregated situation" as used by the District Court in setting forth its standards meant here, as elsewhere in its opinion, simply racially disproportionate schools. On this point the District Court was specific:

> "As used in this opinion, the terms 'racial segregation,' 'racial concentration,' 'racial imbalance,' 'racial identifiability,' and 'racial isolation,' shall refer relatively interchangeably to a condition of disproportionate racial distribution of students. This usage conforms to the practice of most witnesses and authorities introduced at trial." (A-158)

In assessing the importance of omitted acts, the District Court found *Brown v. Board of Education*, 347 US 483, 74 S Ct 686, 98 L Ed 873 (1954) (Brown I), to have imposed an affirmative duty on school authorities, north and south, to avoid or correct racial disproportion in schools, and found this case to have been notice of this requirement ever since.

> "The state and local boards' conscious neglect and inaction in the face of obvious consequences for the Black children of Kalamazoo has significantly compounded the problem of racial segregation in the public schools. In *Brown I*, supra, decided in 1954, the Supreme Court stated that 'in the North segregation in public education has persisted in some communities until recent years. It is apparent that such *segregation has long been a nationwide problem*, not merely one of sectional concern.' 347 U.S. at 491, n. 6 (Emphasis supplied.)" (A-206)

> "In light of the clear notice and requirement of *Brown I*, where opportunities for positive action are presented, where the consequences of failure to act are clearly foreseeable, and where those consequences are significant contributions to the creation or maintenance of segregated schools, the failure to act is deliberate and intentional." (A-207)

The District Court standards were applied in determining ultimately the issue of discriminatory purpose and intent, not to shift the burden of proof on this issue. Though the burden of proof was discussed by the District Court as it had been allocated in other cases, nowhere did the District Court ever even suggest the effect of its standards were simply to shift the burden of proof. The District Court was explicit in describing the effect of acts knowingly taken and significantly and foreseeably contributive to racial disproportion, i.e., such acts provided an *evidentiary foundation* for the *conclusion* racially disproportionate schools were intentionally segregated. Whether the burden of proof was Plaintiffs' or whether it had been shifted to Defendants was never decided by the District Court. Only the ultimate issue of discriminatory purpose and intent was decided and it was determined by the application of two simply stated standards: 1) Did acts knowingly taken (not taken by mistake or accident) significantly and foreseeably contribute to racially disproprotionate schools? 2) Were acts knowingly omitted which could have *prevented* racially disproportionate schools? Obviously, schools do not exist by mistake or accident nor can they exist without the actions of school authorities which not only significantly and foreseeably contribute to their existence, but without which they could not exist at all. Obviously, school boards have the power to provide racially disproportionate schools, and if *Brown I* imposed upon them the duty of doing so and was notice of this requirement, the mere failure to do so is, in itself, a constitutional violation. In sum, by its standards, discriminatory intent and

purpose, and thus a constitutional violation, is equated, as a matter of law, to the mere existence of racially disproportionate schools. By these standards, the equal protection clause not only *forbids* the *segregation* of children in schools because of race; it *requires* them to be *proportionately united* in schools on the basis of race.

Could school authorities since *Brown*, and can they today, treat all children equally in all of their policies and practices without regard to race, with no more required of them than that they take or omit no act with the intent and purpose of separating children because of race, or, on the other hand, have school authorities since *Brown*, and have they today, an *affirmative* duty to consider race and to take or omit no act save those the significant and foreseeable effect of which is to *proportionately unite* children in schools on the basis of race? Surely, whether the equal protection clause requires school authorities across the land to have done one or the other is an important federal question. It is a question which the District Court's standards decided in conflict with the applicable decisions of this Court all for reasons more specifically set forth in the paragraphs that follow:

B. **The district court's standards conflict with the applicable decisions of this court.**

1. While significant racial disproportion may operate to shift the burden of proof on the issue of discriminatory purpose and intent, it cannot be equated with a constitutional violation calling for remedy. This point is made clear by this Court in *Milliken v. Bradley*, — US —; 94 S Ct 1069; 41 L Ed 2d 1069, Footnote 19 in 41 L Ed 2d at 1089, which provides in part as follows:

> "19. * * * However, the use of significant racial imbalance in schools within an autonomous school district as

> a signal which operates simply to shift the burden of proof, is a very different matter from equating racial imbalance with a constitutional violation calling for a remedy. * * *"

2. The District Court's standards conflict with and render meaningless all opinions of this Court rendered in *Keyes v. School Dist. Number One* (supra).

If discriminatory purpose and intent derives solely from the existence of racially disproportionate schools, it must also derive from de facto segregated schools, and de facto segregated schools thus could not constitutionally exist. The distinction between de jure and de facto segregation is thus obliterated, purpose and intent as a differentiating factor in determining the constitutionality of segregation in schools is destroyed, and the holding of the majority opinion in *Keyes v. School Dist. Number One* (supra) is totally nullified. If discriminatory purpose and intent is to be derived from the existence of racially disproportionate schools, it follows it must also derive from the failure to maintain integrated schools (Justice Powell's test) and from state actions that have foreseeably maintained schools that are racially segregated (Justice Douglas' test). Obviously, the District Court's standards nullified the majority holding in *Keyes* and rendered the opinions of Justice Douglas and Justice Powell meaningless insofar as each dissented on the nature of an equal protection violation.

3. By its standards, the District Court derived discriminatory purpose and intent from the existence of *racially disportionate* schools. The opinions of this Court have made it clear racial disproportion in schools is not constitutionally required even as a matter of remedy in dual systems. *Swann v. Charlotte-Mecklenburg Board of Education*, 402 US 1; 91 S Ct 1267; 28 L Ed 2d 554 (1971). In 28 L Ed 2d this Court at 571 said:

> "If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any

> particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse. The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole."

4. The District Court's standards imposed an affirmative duty to attain not only integrated schools but racially proportionate ones.

Brown I reserved the nature and timing of remedy for further argument and this was subsequently reported as *Brown II*, 349 US 294; 75 S Ct 753; 99 L Ed 1083. *Brown I* contemplated and *Brown II* required no more of the Topeka board of education than that it revise its attendance areas into compact units so as to admit plaintiffs to schools on a non-discriminatory racial basis. In 75 S Ct at 756 this Court spoke as follows:

> "To that end the courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a non-racial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems."

From 1954 until 1968 *Brown I* was consistently construed to require no more as a matter of remedy in dual systems than that children be admitted to school on a non-racial basis. An affirmative duty to integrate as a matter of remedy in dual systems was not imposed until 1968 in *Green v. County School Board of New Kent County* (supra). The affirmative duty to integrate was traced by the majority of this Court in *Keyes v. School Dist. Number One* (supra) in a footnote appearing at 37 L Ed 2d 559, and in *Keyes* this Court expressly held the Denver system had no affirmative duty to integrate its system *until and unless*

the district court had first found it to be a dual system. At 37 L Ed 2d at 566, Justice Brennan, speaking for the majority in *Keyes*, said:

> "If the District Court determines that the Denver school system is a dual school system, respondent School Board has the affirmative duty to desegregate the entire system 'root and branch.' "

5. The trial court's standards deprived KBE of a right given it by *Keyes* to show that any racial concentration existing in its schools was not unconstitutional.

The nature of equal protection rights and of an equal protection violation is most clearly delineated by *Keyes* in the instructions which it gave to the district court concerning the Denver board's burden on remand. These instructions make it clear beyond doubt actions premised on a neighborhood school concept are *not* unconstitutional unless they are taken to effect a *policy of segregation* based on race.

In *Keyes* severe racial disproportion existed in core area schools and it had existed a long time under the Denver board's neighborhood school policy. A majority of this Court was explicit concerning the Denver board's *right* to show that racial disproportion in core area schools was not unconstitutional and was equally explicit in defining the *nature* of the board's burden. In 37 L Ed 2d at 566 Justice Brennan, speaking for the majority, said:

> "There, the Board's burden is to show that its policies and practices * * * considered together and premised on the Board's so-called 'neighborhood school' concept, *either were not taken in effectuation of a policy to create or maintain segregation* in the core city schools, or, if unsuccessful in that effort, were not factors in causing the existing condition of segregation in these schools." (Emphasis supplied)

This burden is clarified earlier at 564 as follows:

"Their burden is to adduce proof sufficient to support a finding that segregative intent was not among the factors that motivated their actions."

Neighborhood schools have an independent, neutral, educational purpose totally unrelated to race. They are the most economical, safe and convenient way to provide school facilities for those who use them and they tend to maximize parental participation and interest. They have existed historically and they exist today in many sections of the country *which do not even have* racial concentrations. They existed in Kalamazoo long *before* the arrival of blacks in any significant numbers. Congress has declared the neighborhood school to be the appropriate basis for determining public school assignments. 20 USCA 1701 provides:

"§ 1701. Congressional declaration of policy

(a) The Congress declares it to be the policy of the United States that—

(1) * * *

(2) the neighborhood is the appropriate basis for determining public school assignments.

(b) * * *"

Under *any* neighborhood school policy, no matter how *neutrally* it is administered and no matter how *non-racial* its purpose, the racial proportions of individual schools will vary directly and precisely with the residential racial make-up of the neighborhoods which the schools serve. If the races are proportionately distributed residentially, schools will be proportionate in their student composition; but if the races are residentially concentrated, schools will be racially disproportionate. Under a neighborhood school concept, this is not only a foreseeable consequence—it is one that will necessarily follow from the inherent nature of the concept itself. This is not only

true patently on its face, but was admitted by Plaintiffs' expert on testimony given in this case.

In a school system with racially disproportionate and racially changing residential areas, *every* act premised upon a neighborhood school concept will of *necessity* significantly and foreseeably contribute to the existence of racially disproportionate schools, and this will be true no matter how racially neutral the concept is executed and no matter how clearly it may be shown its purpose was not to effectuate a policy of segregation based upon race.

While *Keyes* held that all acts premised upon a neighborhood school concept were not unconstitutional unless they were taken for a specific and forbidden purpose, i. e., to effectuate a policy of segregation based upon race, the District Court standards would make all such acts unconstitutional regardless of the motive or purpose for them, since each such act must, by the inherent nature of the neighborhood school concept itself, significantly and foreseeably contribute to the racial disproportion that will result in a system with residential areas differing and changing in racial makeup. These standards redefine the nature of a constitutional violation by eliminating the proof that could be shown to disprove one.

C. The Court of Appeals' affirmance of the District Court's standards as formulated and applied also conflicts with the applicable decisions of this Court.

The Court of Appeals affirmed all aspects of the District Court's standards in language as follows:

> "We find this to be a correct formulation of the de jure test, flowing directly from our holdings * * *" (A-290)

In affirming, the Court of Appeals misconstrued the standards applied by the District Court, it ignored erroneous aspects of the

standards, and it erroneously added to the District Court's standards, standards of its own which are in conflict with the applicable decisions of this Court.

1. The Court of Appeals misconstrued the District Court's standards to merely raise a presumption of segregative purpose and shift the burden of proof. The specific language of the Court of Appeals is as follows:

> "A presumption of segregative purpose arises when plaintiffs establish that the natural, probable, and foreseeable result of public officials' action or inaction was an increase or perpetuation of public school segregation." (A-291)

The District Court did not limit its standards to such use but instead applied them to determine the ultimate issue of discriminatory purpose and intent. See Page 28 of this Petition.

2. In affirming the District Court's standards, the Court of Appeals ignored totally that aspect of those standards which, by definition, hinged the issue of intent to the existence of *racially disproportionate schools.* It also ignored that aspect of those standards which judged omissions against an *affirmative duty* the district court held *Brown I* to have imposed on all school authorities to prevent racial disproportion in schools.

3. The Court of Appeals, by its standards, eliminates in substance the relevance of discriminatory intent and purpose as a factor in determining a constitutional violation, and these standards are in clear conflict with the applicable decisions of this Court.

In defining constitutional rights, the Court of Appeals held it was not necessary to establish that segregation in schools was intentionally done (plotted) for evil and bigoted purposes (separating children because of race). Its precise language was as follows:

> "When constitutional rights are involved, the issue is seldom whether public officials have acted with evil motives or whether they have consciously plotted with bigotry in their hearts to deprive citizens of the equal protection of the laws." (A-292)

It also held that the discriminatory intent required for a constitutional violation could exist although individual acts premised upon a concept such as the neighborhood school might *not* have been taken for segregative *purposes* and might not in themselves have been constitutionally invalid. its language was as follows:

> "Rather, under the test for de jure segregation, the question is whether a purposeful pattern of segregation has manifested itself over time, *despite the fact that individual official actions, considered alone, may not have been taken for segregative purposes and may not have been in themselves constitutionally invalid.*" (A-292)

By the Court of Appeals' standard the purpose and intent *Keyes* requires for de jure segregation is established from a "purposeful pattern of segregation." This "pattern" will exist wherever a neighborhood school concept is followed in a system having residential areas which differ or change in racial content. Again the effect of that standard is to remove any distinction between de jure and de facto segregation and to nullify completely an intent and purpose to segregate as the differentiating factor between them. The Court of Appeals' meaning as to the insignificance of purpose under its standards is made clear by this language:

> "Benevolence of motive does not excuse segregative acts. As the Supreme Court stated in Wright v. Council of City of Emporia, 407 U.S. 451, 461 (1972), 'The "dominant purpose" test finds no precedent in our decisions . . . The existence of a permissible purpose cannot sustain an action that has an impermissible effect.' "

Not only does this conflict with *Keyes;* it totally misreads *Wright v. Council of City of Emporia,* 407 US 451, 92 S Ct 2196, 33 L Ed 2d 51 (1972). In *Wright* there was never a question of constitutional violation. *Wright* holds no more than that purpose is not an issue in determining the sufficiency of desegregation remedies affirmatively required in dual systems. It specifically conflicts with *Keyes* where a majority held school authorities could disprove a constitutional violation if they adduced proof sufficient to support a finding segregative intent was not among the factors that had motivated their actions. The specific language of *Keyes* is quoted at Page 38 of this petition.

To support its formulation, the Court of Appeals relied on the opinions rendered by this Court in *Milliken v. Bradley* (supra) concerning the affirmance of de jure findings in the City of Detroit. The Detroit school district was not even a party to the appeal and the correctness of the test applied to determine discriminatory purpose and intent was never at issue in *Milliken.*

In *Milliken* the evidence before the appellate court showed without dispute the Detroit board had gerrymandered boundaries, transported black children beyond near white schools to more distant black ones, bussed black classrooms intact to white schools and segregated them within such schools, had located optionals only or primarily in areas undergoing racial transition, and had established junior and senior high feeder patterns so as to unite only black schools in some and only predominantly white schools in others.

These practices are unconstitutional, not because they significantly and foreseeably contribute to racially disproportionate schools, but because they independently evidence a discriminatory intent and purpose to separate children because of race and are inconsistent with any other plausible inference. They are in stark contrast to policies and practices taken in Kalamazoo as will be seen in the summary of these facts set forth in the next section of this Petition.

Keyes held school authorities could prove their acts premised upon a neighborhood school concept were not unconstitutional if they could produce proof sufficient to show segregative intent was not among the factors that had motivated their actions. In contrast, the Court of Appeals held, by its standards, even if school authorities do show segregative intent was not among the factors that motivated their actions, this showing is not enough to discharge their burden. Obviously, the Court of Appeals, by this standard, seeks to redefine the nature of a constitutional violation and what can be shown to disprove one.

III. KBE's Practices as Premised Upon Its Neighborhood School Concept Were Not Taken to Effectuate a Policy of Segregation and Existing Racial Concentrations Were Solely Caused by Black Migration Patterns.

It is recognized the historical facts and background out of which this litigation arose are not, strictly speaking, necessary to a consideration and understanding of the two principal issues KBE will raise on appeal to this Court if its Petition for Certiorari is granted. It is also recognized these facts are not, strictly speaking, necessary to this Court in assessing KBE's reasons as set forth in this Petition. It is possible this Court will deem such facts, therefore, not properly a part of this Petition. It is for this reason they have been isolated and separately stated at the very end of the Petition.

On the other hand, there is a strong probability this Honorable Court might be less inclined to grant Certiorari without some understanding of these facts and without some assurance that this is a district which has not separated its children intentionally and purposely on the basis of race. This Court may wish some assurance that a trial before a fair tribunal and under proper standards would or could produce a different result. For such reasons, Petitioner has decided to include these background facts so as to give this Court at least the opportunity and option

to read them and give them such weight as they merit in determining whether or not Certiorari should be granted in this case. The facts extend over some 25 years and cover nearly every facet of school board and administrative actions. Because of their magnitude it is important that they be reduced to bare essentials, and that they be related directly to the principal issues in this case, i. e., Cause and Discriminatory Purpose. It is equally important that they be presented in a way that will permit them to be easily and quickly read and yet clarified and substantiated where desirable. To accomplish these ends, the facts are divided under two major subheads, i. e., "Cause" and "Purpose". They are numerically listed and stated in logical sequence with the principal thrust of each fact italicized with amplification as is necessary set forth thereafter.

A. **Cause.**

Racial disproportion in Kalamazoo schools was solely caused by black racial migration.

The centrally essential facts, all undisputed, are as follows:

1. **Blacks did not arrive in Kalamazoo in significant numbers prior to 1945. By the 1940 census they represented only 2.6% of the city's population.**

2. **Before the arrival of blacks in significant numbers and by 1945 the Kalamazoo School District had, in accordance with its historical neighborhood school policy, sited, constructed and boundaried 13 elementary schools, 5 junior high schools, each of which was combined with an elementary, and one centrally located high school.** The 1945 schools are named, numbered, located and boundaried on KBE Exh. 1824 attached for the convenience of the reader. All school sites, school buildings and attendance areas existing in 1945 were established between the late 1800's and the late 1920's. By 1925 the Kalamazoo

School System had 150 black students, representing 1.9% of its student population, with a concentration in no school in excess of 6.6%.

3. **By 1945 black families lived in nearly all parts of Kalamazoo with four general areas of greatest concentration, i. e., north central, northeast central, southeast and rather central, with a fourth smaller concentration in the southeast part of the city more than one mile from its center.** This pattern of black residential location in 1945 was established by a stipulation showing black children attending every one of the 14 schools in the system, with highest numbers attending Lincoln (1) (north central area), Roosevelt (4), (northeast central area), Harding (6) (southeast rather central area), and Hillcrest (11) (southeast more than a mile from the city's center). This residential pattern was also verified by a 1937 Negro population survey. The four areas of concentration have been marked on KBE Exh. 1824 for illustrative purposes.

4. **Black migration between 1945 and 1970 increased dramatically and the pattern of this migration into the various parts and neighborhoods of the city and into various school attendance areas of the school district varied widely.** By 1970 the number of blacks living within the 1940 boundaries of the city had increased from 1,117 (2.6%) to 7,974 (16.1%). In the north central sector, non-white households increased from 309 to 1,526 (393%), all within the unchanging peripheral 1945 elementary boundaries of Woodward, Lincoln and North Westnedge. Black elementary students living within the same attendance area increased from 114 (6.8%) in 1945 to 1,248 (76.1%) in 1969. During this same interval, black migration to the northeast sector was slower. Roosevelt was 4.4% black in 1945 and had increased to 46.3% black in 1970. Black migration to the south central sector was still slower. Edison elementary, covering most of the old Edison and Harding attendance areas, was 17.6% black and in near perfect racial balance

in 1970. Blacks not only did not migrate to the southwest sector of the city some one mile distant from its center, the fourth major area of concentration in 1945, but those living in this area had by 1970 apparently moved elsewhere. Hillcrest elementary school, located in this area, was 10.8% black in 1947 and 1.0% black in 1969. There was minimal or no black migration during this time interval in the 7 remaining 1945 elementary school areas. These schools had 30 blacks (1.3%) in 1945 and had 91 (3.6%) in 1969. All of these facts are admitted by stipulation.

5. **This varied pattern of black migration into neutrally and long established attendance areas singly and solely produced the racial disproportion which existed in KBE schools in 1970.** The extremes of racial disproportion were reached all within the 1945 elementary schools, each of which included in 1945 at least some black families. The extremes in 1970 were represented by Lincoln, (1) 95.6% black, and Northglade, (22) 87.2% black, at one end, and Wilson, (9) 0.3% black, and Parkwood, (13) 0.0% black, on the other. These facts are admitted by stipulation.

6. **KBE did not, by any act or omission, cause nor contribute to this black migration of Kalamazoo.** This is admitted by stipulation.

B. **Purpose**

The actions taken by KBE between 1945 and 1970 were not only racially neutral, they were, by any objective standard, totally inconsistent with the purpose to separate children because of race.

The centrally essential facts, all undisputed, are as follows

1. **KBE annexed adjoining and preponderantly white school districts along the east, south and west.** It combined its high

school students from both the old 1945 and annexed areas in old Central until it was ultimately replaced, because of age and inadequacy, with two new high schools, Loy Norrix (15) and new Central (16). New Central was sited and boundaried with racial balance as a guiding principle, producing in 1971 a black composition of 14.1% in Loy Norrix and 15.1% in new Central. The annexed areas and the two new high schools are named, numbered and located on Plaintiffs' Exh. 1676 attached for reader convenience.

2. **Because of age and inadequacy of existing facilities, it sited and constructed 5 new junior highs boundaried to include elementary feeder schools from both old 1945 and newly annexed areas.** The 5 new junior highs by name and number are as follows: South (17), Northeastern (18), Hillside (19), Milwood (20), and Oakwood (21). Each are also named, numbered, located and boundaried in 1970 on Plaintiffs' Exh. 1676 attached on the opposite page. Northeastern combined Roosevelt elementary (46.3% black) with elementaries from both the old and newly annexed areas having racial proportions of 0.6%, 0.9%, 4.1% and 1.8%, to produce a student body of within .1 of 1% of perfect racial balance. South Junior High combined Lincoln elementary (95.6% black) in 1969 with elementaries from both the old and annexed areas having racial proportions of 2.9%, 1.0%, 8.8%, 4.4%, 17.1% and 0%, to produce a student body of 26.2% black in 1970. Hillside Junior High combined Woodward and Northglade elementaries, 53.8% and 87.2% black respectively in 1969, with elementaries from both the old and newly annexed areas having racial proportions of 2.0%, 0.6%, 0% and 7.4% respectively, to produce a student body in 1969 which was 24.6% black. Milwood and Oakwood Junior Highs each combined old 1945 and newly annexed elementaries which were in each case predominantly white. In 1971 the district reboundaried its five junior highs solely to achieve racial proportion in all of them though none had ever been more than 28% black and though its legal counsel advised

the district could but was not legally required to alter attendance areas for such purpose. All of these facts are admitted by stipulation.

3. **It basically continued its 1945 neighborhood school elementary attendance areas and continued a similar basic pattern of neighborhood school attendance areas already existing in the newly annexed areas at time of annexation.** The neighborhood school pattern of elementary attendance areas in both old 1945 and newly annexed areas readily appears on Plainiffs' Exh. 1675 attached for reader convenience. Among old 1945 schools Harding was closed (underutilization). North Westnedge was destroyed (old age) and replaced by newly sited and reboundaried Northglade (22). Most of old Edison was rebuilt on the same site. 1970 elementaries in the old 1945 area are named, numbered, located and boundaried in Plaintiffs' Exh. 1675. By 1970, 10 newly annexed elementaries remained on old sites, i.e., Brucker (23), Burke (24), Spring Valley (25), Lakewood (26), Greenwood (27), Milwood (28), South Westnedge (29), Oakwood (30), Chime (31), Grand Prairie (32). Only four K-6 newly annexed elementaries were built on new sites, Winchell (33), Arcadia (34), Westwood (35), and Indian Prairie (36). Three K-3 schools were built on new sites: Fairview (37), Peter Pan (38) and Pleasant Park (39). All of these elementaries are also named, numbered, located and boundaried on Plaintiffs' Exh. 1675 as attached.

All construction completed between 1945 and 1970 is summarized in chronological order on a single uncontradicted exhibit (KBE 963). Without dispute, this construction covered a wide range, including mere maintenance, substantial remodeling, permanent additions of differing sizes, and some entirely new schools on old and new sites. Without exception the pattern was identical, regardless of an area's racial content or racial change and whether in the old 1945 area or in areas newly annexed.

4. **The complete neutrality of its elementary neighborhood school policy is incontrovertibly evidenced by action it took in areas of highest black concentration or change, which were not only consistent with the neighborhood school policy, but totally inconsistent with a purpose to separate because of race.** In the highest area (north central), not only were boundaries never gerrymandered (admitted by Plaintiffs' expert), but, more often than not, boundary changes tended to *reduce* black racial concentrations in adjoining schools (Lincoln and Woodward). In the second highest (northeast) the two boundary changes made to Roosevelt elementary each added predominantly white areas (96.7%; 95.1%) which were transferred from white Wilson (0.0% black in 1970) to more nearly black Roosevelt (47.3% in 1970). Not only were school facilities constructed and maintained for *all* children in *all* areas regardless of racial makeup, but in the north central area an old school (North Westnedge) was closed and a new one (Northglade) resisted, not only perfectly sited and sized by neighborhood school standards, but reboundaried so as to include the blackest portions of the blackest (Lincoln) school with nearly white portions of an adjoining nearly white school (Woodward). KBE's over all diversion of large portions of Lincoln to compensatory non-classroom use demonstrates its neutrality more persuasively than any other series of actions. Lincoln was a huge facility (capacity 1,372) built in 1922, in what was to become the area of blackest concentration. It was built for use optionally as an elementary, junior or senior high school. As its attendance area turned black, KBE refused options to use it as a junior or senior high school though it had need for such facilities, and subsequently constructed them elsewhere. It then phased out Lincoln as a junior high school and sent its preponderantly black children to nearly white Hillside and South, and transferred, as above indicated, the blackest portion of Lincoln's elementary area to Northglade. Had this huge facility been used solely for classroom use, the district could have concentrated nearly all of this area's

blacks in this single facility. All of these facts are undisputed and undisputable.

5. **This neutrality is further incontrovertibly confirmed by KBE actions in the area of stable racial mix, where it sited, sized and constructed facilities for student bodies near perfect in racial proportion.** In the southeast central area (Harding-Edison) it proceeded to close old and under-used facilities (old Edison and Harding) and *replace* them with a new facility (new Edison), specifically sited, sized and boundaried so as to provide this entire area of stable racial mix with an elementary school having population within .2 of 1% perfect racial proportion in 1970. These facts are admitted by stipulation.

6. **It is further confirmed by its neutral use of devices it could have used to segregate racially, had this been its purpose.** Optional zones were used but weren't located in areas of racial concentration or change (north central area or northeast area), and were for the most part between schools of comparable racial composition. Wilson-Brucker (40); Hillcrest-Winchell (41); Westwood-Indian Prairie (42). They were terminated when termination increased racial balance and they were continued when termination would have decreased it. Portable classrooms were used, but nearly always in the middle of preponderantly white areas, and not in adjoining schools of opposite color to avoid boundary change. Transportation, especially after the annexation of rural Oshtemo in 1965, was used but insofar as its use was racially related it was used to bus children not *beyond* but *to* schools of opposite color. When state laws did not provide equal reimbursement, KBE sought to invalidate such state laws, and, failing, proceeded, unilaterally, to provide equal transportation within city limits where blacks lived as well as without, where they did not, the difference in reimbursement under state law notwithstanding. Occasional transfers between schools were allowed, but insofar as the evidence related to race, it showed they were used to permit children to

transfer *to*, not *escape from*, a school of opposite color. These are all facts either admitted by stipulation, by Plaintiffs' evidence, or are established by uncontradicted testimony of KBE's witnesses.

7. **It is further confirmed by KBE's minority personnel employment and assignment policies which evolved from one of non-discrimination, to one where race was affirmatively considered solely, however, to benefit, not discriminate, against black children.** Prior to 1967 KBE followed a non-discriminary employment policy for which it received national recognition. Beginning in 1967 and thereafter it followed an affirmative policy to seek and employ larger numbers of black staff Both policies left it, even in 1971, with a shortage of black staff. Prior to September of 1970 KBE's basic stance was to assign staff without regard to school racial composition. This basic stance was modified by two exceptions, i. e., (1) it tried to assign no less than two black teachers to a school, if possible, and (2) it leaned in favor of assigning more black teachers to schools with higher proportions of black children. Under this policy from the fall of 1959 through the spring of 1970 at least one black staff member had been assigned at least one year in 20 of 26 of KBE's K-6 elementary schools. Though the majority of its black staff was assigned to the five elementary schools having highest percentages of black students, no school prior to fall of 1970 had more than 5 black staff members; none had more than 20% black staff, and save for two schools in a single year none had a higher percentage of black staff than the black student composition of the system as a whole. (In 1969 Lincoln had 20% black staff and Northglade had 18.5% black staff, while the black elementary composition of the district in that year was 16.1%). There is no dispute as to these facts. This assignment policy was changed commencing in the fall of 1970. After a period of racial unrest, prevalent nationally and also focused in Kalamazoo, KBE changed its minority assignment personnel policy in the year indicated. It

appointed and gave black administrator Dr. Charles Warfield wide latitude in the matter of black teacher assignment in minority schools. Under his guidance, the principal change in black teacher assignment was to increase black staff at Lincoln from 4 to 14 and at Northglade from 4⅓ to 7. The district's only purpose for this change of policy made in response to the philosophy of Dr. Warfield and the forceful desires of black leaders, was to utilize its limited black staff for the best educational interests of black children. The purpose for KBE's assignment policy both before and after the fall of 1970 is not disputed. At the preliminary injunction hearing Plaintiffs offered no proofs concerning personnel assignment and the court specifically excluded staff assignment from its preliminary injunctive order. The 1970 assignment policies continued during the litigation without modification or request for modification. Proofs concerning the results of these assignment policies were adduced in trial on the merits and the district court made no order modifying KBE's employment or staff assignment policies.

8. **It adopted and implemented purposeful steps to increase racial balance in its schools, leading ultimately to the sudden adoption of the May 7th racial balance plan and the July 6th resolution postponing it for one year.** Commencing in 1966 KBE expressly adopted racial balance (heterogeneity) as an educational principle and expressly acted to study and attain this educational end. It adopted racial balance plans for its junior and senior high schools and its committee studied, reported and made recommendations concerning plans to racially balance its elementary schools. KBE called upon its administration to report further, however, on possible methods of attaining racial balance in its elementary schools with further analysis of budget curriculum implications. It was while still awaiting this report in April of 1971 the May 7th racial balance plan was suddenly called for and adopted. The first resolution calling for and leading to this plan passed April 5, 1971, called upon the administration to provide a plan within 28 days. Administration had no time to choose between plans and barely

time to submit, even in skeletal form, the only plan they then had already under consideration. The basic educational concepts of this plan were conceived by a lay committee without administrative consultation even from KBE's key administrators most directly involved and concerned with such a plan. The May 7th plan was adopted 28 days after it was first called for without analysis as to the extent of busing it involved, without analysis as to the burden or inequity of the plan in its operation, without considering its adverse educational effect on the poor, whether black or white, nor upon any other aspect of its operation. It was passed by a departing board majority of four, each of whom knew passage of a racial balance plan by them before they departed legally could lock in any subsequent board after they left. The May 7th plan was thus planned and plotted by a departing board majority meeting not as a board but privately in clear and distinct aberration of board policy. These facts are either admitted by stipulation or rest on uncontradicted testimony, usually corroborated by Plaintiffs' evidence. The plan, its ramifications and the circumstances under which it was adopted, became central issues in the June, 1971 election. Two board members opposed to the plan were elected, and on the first meeting of the new board the July 6th resolution was adopted. It postponed implementation of the May 7th plan for one year pending further study. It called upon administration to develop and submit alternative plans to improve racial and socio economic balance, and it provided in the interim for a voluntary transfer and transportation plan permitting students to transfer from neighborhood schools where better racial and socio economic balance was attained. The present litigation was filed to void the July 6th resolution and require implementation of the May 7th plan.

C. **Summary.**

The constitutional violation found in this case is based solely upon the failure to provide racially proportionate schools, not upon the effectuation of a policy of segregation based on race.

KBE did not move boundaries to include black areas with black schools; if anything, it did the opposite (Roosevelt). It did not provide transportation differently for children living outside city limits as compared with those living within; it did the opposite. It did not build new facilities to concentrate black children in preponderantly black areas; it did the opposite (Lincoln). It did not gerrymander boundaries; it did the opposite. It did not transfer children beyond a nearer school of opposite colors; it did the opposite. It did not build schools specifically for black children, i. e., located, sized and boundaried for black residential areas; it did the opposite (Northglade). It did not close schools in racially mixed areas and build new and additional facilities in black or white areas; it did the opposite (Edison). It did not locate and maintain optionals in transitional areas; it did the opposite. It did not locate and use portables or primaries between adjoining black and white schools in lieu of boundary change; it did the opposite. It did not use transfers for racial reasons, i.e., to permit children to escape from schools of opposite color; it did the opposite. It did not combine black feeder schools in some junior highs and white feeder schools in others; it did the opposite. When race became a factor in school assignment, the purpose was to attain racial proportion, not to avoid it, and when it became a factor in personnel, it was to benefit black children, not discriminate against them.

If these actions do not conclusively establish the absence of a policy of segregation based on race, one might ask what more could be shown. In this case more was shown. The two ad-

ministrators having direct knowledge concerning the purpose for every act taken and premised upon Kalamazoo's neighborhood school concept testified. One's continuous tenure, the school superintendent's, extended for 10 years prior to the commencement of this lawsuit, and the other's, the child attendance officer's, extended for 35 years prior thereto. Each testified racial motive or segregative intent was never a factor in these actions. This testimony was not disputed.

A constitutional violation was found in this case not because KBE effectuated a policy of segregation based upon race, but because it did not effectuate a policy to proportionately unite children in schools on a racial basis.

If boundaries proved a violation, it was not because they were gerrymandered on the basis of race but because they were not moved where necessary to attain racial proportion.

If transportation policies proved a violation, it was not because of a policy to segregate on the basis of race, but because they were not used to unite children in schools on a proportionate basis.

If construction practices proved a constitutional violation, it was not because they discriminatorily differed depending upon the racial makeup of different areas, but because they were not changed from a neighborhood school concept as would be necessary to attain racially proportionate schools.

If the July 6th postponement resolution was unconstitutional, it was not because its purpose was to separate because of race, but because it delayed the operation of a plan conceived and adopted to attain racial balance in schools. The May 7th racial balance plan was not required because a prior policy of segregation had been effectuated. It was adopted to attain racial balance in schools and its timing and passage was motivated

by a purpose to remove, by corruption of the political process, the right ever to depart from racially proportionate schools.

It is respectfully submitted if the Constitution does not require school authorities to affirmatively provide racially proportionate schools, this Court ought to grant this Petition.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the decision of the Sixth Circuit rendered herein on December 9, 1974.

Respectfully submitted

FORD, KRIEKARD, STATON and ALLEN

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Dated: March 10, 1975.

MAP(S) IS/ARE TOO LARGE TO BE FILMED

74-1131

74-1132

Supreme Court, U. S.
FILED
MAR 10 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1974

No.....

KALAMAZOO BOARD OF EDUCATION,
Petitioner,
and
MICHIGAN STATE BOARD OF EDUCATION, a Constitutional Body Corporate; JOHN W. PORTER, Superintendent of Public Instruction of the State of Michigan,
Petitioners,

vs.

MICHELLE OLIVER, by Her Father and Next Friend, ROBERT JONES; DAWN KIRK, STEPHEN KIRK and KIMBERLY KIRK, by Their Father and Next Friend, WYATT KIRK; LEAH ROBIN and PAUL ROBIN, by Their Father and Next Friend, STANLEY ROBIN; TIMOTHY SMITH, by His Mother and Next Friend, CAROL SMITH; LARISA MILLER and MARK MILLER, by Their Mother and Next Friend, KAREN MILLER; SCOTT ODOM, by His Mother and Next Friend, SUE ODOM; LISA MILLER, by Her Mother and Next Friend, MARGARET MILLER; STEPHEN PULASKI, LEAH PULASKI and MARK PULASKI, by Their Mother and Next Friend, EDITH PULASKI; JOHN FLYNN, DR. DONALD MAY and JOHN VAN ZOEREN, Parents, Are All Parents or Minor Children Thereof Attending Schools in the Kalamazoo Public School System; THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, KALAMAZOO BRANCH,
Respondents,

vs.

KALAMAZOO CITY EDUCATIONAL ASSOCIATION, THE MICHIGAN EDUCATION ASSOCIATION and THE NATIONAL EDUCATION ASSOCIATION,
Respondents,

vs.

THE LEAGUE OF WOMEN VOTERS OF MICHIGAN and the KALAMAZOO AREA LEAGUE OF WOMEN VOTERS,
Respondents.

JOINT APPENDIX

Of Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit on Behalf of Petitioners Kalamazoo Board of Education and Michigan State Board of Education et al.

(Signatures Appear on Inside Cover)

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(Filed August 24, 1971)
Docket No. 16

UNITED STATES OF AMERICA
IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHELLE OLIVER, by her Father and Next Friend, ROBERT JONES; DAWN KIRK, STEPHEN KIRK and KIMBERLY KIRK, by their Father and Next Friend, WYATT KIRK; LEAH ROBIN and PAUL ROBIN, by their Father and Next Friend, STANLEY ROBIN; TIMOTHY SMITH, by his Mother and Next Friend, KAREN MILLER; SCOTT ODOM, by his Mother and Next Friend, SUE ODOM; LISA MILLER, by her Mother and Next Friend, MARGARET MILLER; STEPHEN PULASKI, LEAH PULASKI, and MARK PULASKI, by their Mother and Next Friend, EDITH PULASKI; JOHN FLYNN, DR. DONALD MAY and JOAN VAN ZOEREN, Parents, are all parents or minor children thereof attending schools in the Kalamazoo Public School System; THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, KALAMAZOO BRANCH,

Plaintiffs,

vs.

KALAMAZOO BOARD OF EDUCATION, a body corporate; EDWARD P. THOMPSON, ANDREW C. LUFF, A. T. LUEY, JACK HOEKSTRA, DR. DALE PATTISON, NORMAN BRUEX, ALLAN TYLER, members of the BOARD OF EDUCATION OF THE CITY OF KALAMAZOO; REED HAGEN, Acting Superintendent of the Kalamazoo Public Schools; MICHIGAN STATE BOARD OF EDUCATION, a constitutional Body Corporate; JOHN W. PORTER, Acting Superintendent of Public Instruction, Department of Public Instruction, Department of Education and ex Officio Chairman of Michigan State Board of Education,

Defendants.

K-88-71 C.A.

PRELIMINARY INJUNCTION

The Court, having examined numerous documentary exhibits, attendance zone lines, administrative studies, and having heard the testimony of several witnesses over a two-day period, together with oral argument of counsel, this Court makes the following preliminary findings of fact and conclusions of law:

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHELLE OLIVER, Etc., et al, *Plaintiffs,* vs. KALAMAZOO BOARD OF EDUCATION, Etc., et al., *Defendants.*	No. K88-71

OPINION OF THE *HONORABLE NOEL P. FOX* ON "PLAINTIFFS' APPLICATION FOR A PRELIMINARY INJUNCTION" FROM PROCEEDINGS WHICH COMMENCED ON THURSDAY, AUGUST 19, 1971, AT THE COUNTY BUILDING, MUSKEGON, MICHIGAN.

James L. Reinardy
Official Court Reporter
United States District Court
Federal Building
Grand Rapids, Michigan 49502

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Friday, August 20, 1971
Muskegon, Michigan
10:05 p.m.

OPINION OF THE COURT

THE COURT: I want to thank each and everyone of you for your cooperation and consideration of the Court, and I want to state that I am rendering this opinion from the bench from notes and an accumulation of material which I have gathered during the course of this trial, from the evidence, from the briefs of the parties, from exhibits, from the arguments of counsel, and from a consideration of all that has been submitted and presented to the Court.

I reserve the right to check this record and make any corrections in it so that it conforms to precisely what I intend to say. Starting at five after ten at night after two very heavy days, I may make a slip now and then in the phraseology or may not accurately communicate the concepts that are in my mind and form the letter, the rationale, the spirit and the letter of my opinion.

The jurisdiction of this Court is properly invoked under *28 USC, Sections 1331(a), 1343(3) and (4),* this being a suit in equity authorized by *Title 42 USC, Sections 1983, 1988 and 2000d.*

Jurisdiction is also invoked under *42 USC 1981,* and further invoked under *28USC, Sections 2201 and 2202,* this being a suit for declaratory judgment seeking to declare the July 6, 1971 resolution of the Kalamazoo, Michigan, Board of Education unconstitutional, and other relief.

On August 12, 1971, this Court entered a Temporary Restraining Order enjoining the defendants, Kalamazoo Board of Education, its agents, employees and other persons acting in concert with them from implementing the voluntary open enrollment plan contained in the July 6th resolution of the Kalamazoo Board of Education, pending further hearing on plaintiffs' application for a preliminary injunction. Plaintiff's application seeks extension of the injunctive order of August 12, direc-

tion of implementation of the plan of school desegregation adopted by the Kalamazoo Board in its earlier resolution of May 7, 1971, and an injunction restraining the defendants from further school construction and requiring assignment of school faculty and staff personnel so as to achieve racial balance for the purpose of acquiring equal opportunity for education and quality education.

Having examined numerous documentary exhibits, attendance zone maps, administrative studies, and having heard the testimony of several witnesses over a two-day period, and the oral arguments of counsel, this Court finds the following factual circumstances:

The schools maintained and operated by the Kalamazoo Board of Education are racially segregated. There appears no dispute as to the fact that five elementary schools – Lincoln, Woodward, Edison, Roosevelt, and Northglade – are predominantly populated by black students, although the population of the Kalamazoo School District as a whole is merely approximately 23 percent black. The remaining twenty-four schools are predominantly "white" schools.

Thus we begin this decision confronted with the undisputed fact that Negroe black children are being deprived of quality education in the Kalamazoo School System, and that early deprivation of innocent young children culminates in permanent, devastating, irreparable harm – harm incapable of subsequent correction. This is best described by the *Brown* vs. *Board of Education* opinion of the United States Supreme Court, *347 U.S.* commencing on *page 492:*

"In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when Plessy vs. Ferguson was written."

These are the words of Chief Justice Warren. (Continuing) "We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.

"Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

"We come then to the question presented: Does *segregation* of children in public schools *solely* on the *basis of race,* even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.

"In *Sweatt* vs. *Painter, supra,* in finding that a segregated law school for Negroes could not provide them equal opportunities, this Court relied in large part on 'those qualities which are incapable of objective measurement but which make for greatness in a law school.' In *McLaurin* vs. *Oklahoma State Regents, supra,* the Court, in requiring that a Negro admitted to a white graduate school be treated like all other students, again resorted to intangible considerations: '. . . his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession.' "

Skipping a little further.

"Whatever may have been the extent of psychological knowledge at the time of *Plessy* vs. *Ferguson,* this finding is amply supported by modern authority, namely,

" 'Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting

the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racially integrated school system.' "

That is a quote by the Court from a Kansas case.

"We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment."

The officials of the Kalamazoo Board of Education in the school system have, by their actions, admitted that these black children are being given an inferior education, psychologically damaging to their self-image and economically damaging to their ability to perform in an adult world. To a child, segregation "reinforces the idea that he is different, separate and inferior"...and the cause of that segregation is irrelevant "as it would make no difference whether it be *de jure* or whether it be by circumstance...*de facto*", the harm remains. [*Davis* vs. *Pontiac, Page 4.*]

I am speaking now simply as to the effect on the child. I am not engaging in legal terminology. I am not making a precise lawyer-legalistic distinction. I am categorically saying that whether the segregation is de facto or de jure, the impact on each and every individual black child so situated is the same; and this is seventeen years after *Brown*.

On May 7, 1971 — I am going on with findings now — the Kalamazoo Board of education adopted a plan for the redefinition of attendance areas designed to effect substantially increased racial integration. The parties are agreed that this plan, if implemented, would achieve this intended result.

Every school official and every member of the School Board who testified who were members of the Board at the time of the adoption of the May 7, 1971 plan, admitted this fact.

In June of 1971, A School Board election campaign was dominated by outpourings of community resentment of and hostility towards the integration plan promulgated on May 7. As a result of the June 14, 1971 election, two new members were elected to the Board. These individuals had campaigned vigorously on a platform which promised the nullification of the May 7th resolution and the overturning of the integration plan incorporated therein.

At the very first Board meeting following the election, on the motion of Mr. Hoekstra, supported by Dr. Pattison who drafted the resolution, the newly constituted Board passed a resolution which effectuated this promise. In lieu of the structural changes provided under the extinguished plan, the new resolution of July 6th provided for a "Voluntary Open-Enrollment Plan."

As was observed in the most recent Tenth Circuit *Keyes'* case cited by defense counsel in arguments, Judge Hill concluded that the experiences with the voluntary plans were far less than satisfactory.

Evidence of the effect of a voluntary plan may be gathered in part by the fact that up until seven days ago from July 6th forward, the voluntary plan was available and only ten applications were received affecting about 15, I think it was, students.

No further action was taken thereafter because of the restraining order of this Court. Volunteer plans, at best, are incomplete and do not come up to the standards of compulsory plans, especially when the segregation has been so deepseated and long lasting.

Feeling this Board action delaying and stifling the earlier Board effort to integrate the public schools constituted an infringement of their Constitutional rights to equal protection of the laws and due process of law, the plaintiff school children and their parents brought this class action under *Rule 23* of the

Federal Rules of Civil Procedure on behalf of all persons in the City of Kalamazoo similarly situation. The Kalamazoo Branch of the National Association for the Advancement of Colored People joined in bringing this action.

The Board action of May 7, 1971, was not without extensive prior consideration, study and deliberation. At least as early as May 20, 1968, the Board instructed the school administration to develop a plan for integrating the district's elementary, secondary and junior high schools. The administration committee established to carry out this charge made its report on November 8, 1968. That report opened thusly:

"The Kalamazoo Board of Education, in an attempt to bring about a realization of equal opportunity by deliberate cooperation without regard to racial or other social barriers, propose to do away with segregation and deprivation among students in the Kalamazoo Public Schools."

Now that was on November 8, 1968, nearly four years ago. That same report deliberately defined its exact meaning in this area. It defined "segregation" as "the social system represented by (among other named characteristics) the designation of inferior biological and social status through legal means and the power of the community."

The indication that legal segregation which deprived students of their constitutional right to equal educational opportunity existed in Kalamazoo was subsequently emphasized and elaborated by this administration committee in that section of its report entitled "Rationale for Integration." Therein the committee expressly stated that legal considerations were central to the Kalamazoo integration effort. Extensive reference was made to the landmark decision of the United States Supreme Court in *Brown* vs. *Topeka Board of Education, 347 U.S. 483,* as well as to a very significant joint statement of the Michigan State Board of Education and the Michigan Civil Rights Commission which is discussed in detail herein below.

On November 6, 1968, another committee was charged by the Kalamazoo Board of Education to study the problem of racial segregation in the schools and to make recommendations

regarding a suitable integration plan. Thereupon, according to the testimony of Mr. Donald C. Smith, its chairman, the Citizen's Racial Balance Committee entertained thorough consideration and study of several possible plans for achieving racial integration. Among the alternatives investigated were:

One. Pairing of "white" and "black" schools within enlarged attendance areas.

Two. Establishment of some kind of Educational Center which would service in a scheduled manner schools located around its perimeter.

Three. Development of a single giant school complex, along the lines utilized in Evanston, Illinois, which would draw upon the entire school district.

Four. Conversion of present school facilities to allow individual schools to provide an educational program for only a single grade.

And, five. One-way busing of black children to "white" schools.

Also considered by the Citizen's Committee was an open-enrollment type of voluntary plan. Mr. Smith explains that while at first the members of the committee were very favorably impressed with this concept, upon further investigation they discovered that such plans have been found in other communities to be wholly unfeasible and impractical solutions to the problem of racial integration.

On August 18, 1969, the Citizen's Racial Balance Committee tendered its findings and recommendations to the Board. The Committee found that over 90 percent of all black elementary students were housed in the five elementary schools located on the north side of town and that 95.5 percent of all black junior high students attended three of the five junior high schools.

The Committee report further stated:

"These figures illustrate the serious extent to which racial segregation exists in the Kalamazoo school district. Racial isola-

tion has had a serious effect on the achievement of the students thus isolated; the predominantly black attended schools achieve at a level two grades below national norms in grade six. Compared to the top achieving schools in our city, they are four grades below."

Identifying both moral and legal grounds for moving quickly to correct this stark inequitable condition of educational deprivation, and respecting, too, the need to move reasonably and thoroughly, the Citizen's Committee recommended a three-phase program for implementing improved educational opportunity and quality through racial integration.

Phase One was to absorb the time from September 1969 to September 1970. During this time it was advised that increased black faculty and staff be recruited, in-service training of present personnel be implemented to help them understand and relate to minority students, curricula be reviewed with an eye to relevance to the needs of black students, and efforts be initiated to educate the community as to the conditions and implications of racial imbalance in the schools and the need to correct it.

Phase Two was recommended to overlap Phase One and to extend to September of 1971. This phase of the program called for exchange visits of students and teachers between currently existing black and white PTA groups. Also to be sought during this preparatory period were "imaginative suggestions to ease tensions" so as to prepare the community for implementation of the integration plan embodied in Phase Three.

Against the background of this careful and methodical preparation, the Committee recommended the final effectuation of concrete desegration efforts in September 1971, based on a plan whereby neighborhood attendance areas would be enlarged and existing elementary schools would be designed to service either grades K-1, 2, 3, or grades K-4, 5, 6. Specific formulation of attendance zone boundaries was recommended to be made in conjunction with a freely available computer program established for such purposes at the Illinois Institute of Technology. The earlier-formed administration committee fully concurred in these recommendations.

Mr. Smith testified that this recommendation for racial balancing was considered by himself and the Committee as a whole a "necessary first step" in achieving quality education by way of finally providing equal educational opportunity.

It wasn't racial balancing for balancing of races primarily. It was only a first step to accomplish the ultimate desired end.

In September of 1969, within a month of the submission of the above-summarized report, the School Board adopted and implemented Phases One and Two of that report.

I might add also that there were letters which evidenced that the report had been submitted for consideration and comment by many educators across the country and by public officials, including the Secretary of Housing, George Romney, and President Miller of Western Michigan University. Their advice was sought, their comment was sought, and all of them responded in the affirmative that it was a good report. Many of its recommendations were incorporated in the May 7th plan.

In May of 1971, the Citizen's Racial Balance Committee reconvened and consulted with regard to the Illinois Institute of Technology computer arrangements. Throughout 1970, individual members of the Committee urged the Board to follow through with the scheduled ultimate realization of the integration plan.

Nevertheless, at its January 1971 meeting, the Board announced its intention to integrate only the high schools in September of 1972. No plans were announced with regard to the elementary schools.

At the urging of several community leaders, however, the Board resolved in April 1971 to investigate the possibility of implementing a comprehensive plan along the lines of Phase Three in September of 1971.

Dr. John Cochran, Superintendent of Kalamazoo Schools, then set about the task of readying a specific detailed proposal for Board consideration in May. The computers of the Illinois Institute of Technology were put to work and a plan devised. That plan was duly accepted and adopted by the Board on May

7, 1971, amid great public debate. It is worthy of note that the plan as adopted was endorsed by both the Kalamazoo City Education Association and the Kalamazoo Association of School Administrators.

After the action of the Board on May 7, Dr. Cochran directed extensive efforts towards readying the district mechanically to make the necessary changes. The administration gathered the names of all students, mailed to them information about the new attendance plan, prepared for the necessary staff and teacher transfers, packed library and other equipment and materials for shipment to new locations, instituted open houses to acquaint students with their prospective new surroundings, contacted parent groups to encourage the welcoming of new members, and planned dry run exercises for those who would be bused for the first time under the new plan. Newspapers ran illustrations of the new attendance zone maps, while administrators and civic leaders appeared before community groups and organizations to prepare citizens for the new plan.

These preparations were frozen upon the election of the new Board members in June.

The new Board members and defense counsel have contended and attempted to demonstrate to this Court that the action of the School Board in drafting and promulgating the May 7th plan was precipitous.

This Court finds, as a matter of fact and law, that it was not precipitous; that it was a very careful, deliberate, fully-considered plan by conscientious, sincere, publicly dedicated, self-sacrificing men who had the courage to "bite the bullet."

On July 6th, the new membership of the Board, reflecting outspoken community hostility to the integration plan, reinstated the old boundary lines and their attendant racially segregated schools.

Dr. Cochran, the Superintendent of Schools, on July 9th was pressured by the new Board into resigning his position as Superintendent, and I find that that pressure was a result of the activities of Dr. Cochran in promulgating and preparing and

attempting to execute this carefully considered plan of integration.

Both Dr. Cochran and Mr. Reed Hagen, the newly appointed present Superintendent of the Kalamazoo Schools, have testified that the May 7th plan can still be practicably implemented by the opening of this present school year.

There has been submitted evidence in this case as to the economic costs prospectively entailed in the implementation of the May 7th plan.

The Court finds that a great bulk of these costs is attributable to the failure of administrative personnel to assume responsibilities for preparing matters within their respective areas of competence.

This Court also finds that the raising or lowering of blackboards and drinking fountains, the painting of walls and other such environmental refinements are not matters of exigency which require the delay of desegregation efforts.

This Court further finds that evidence regarding the availability of buses for the implementation of the May 7th plan does not establish the practicable impossibility of realization of that attendance zone plan.

The testimony of the two Superintendents that the May 7th plan could be implemented by the beginning of the school year is bolstered by additional evidence that federal funds will become immediately available upon the implementation of this plan.

There was testimony to the effect that the budget was very lean and there was no provision in the budget to provide for it [the May 7th plan], therefore it should not be executed, that it would result in a deficit. There is testimony to the effect that within the last two years or so the School Board was called upon to meet a non-budgeted emergency situation when the State Supreme Court decided that, as a matter of law, the students were entitled to free testbooks and, likewise, free lunches. And, in addition, there is testimony from the present Superin-

tendent of Schools that at that time, coextensive with these unbudgeted demands, the School Board was denied $250,000 by reason of a cut in school aid from the State. None of these problems are insurmountable. None of them. All of them are attainable.

This aid fund is available under the Federal Emergency Desegregation Act, of which this Court takes judicial notice. This May 7th plan can be financed if ordered by the Court.

As to the above statement of facts, there can be no significant dispute. The defendant School Board appears to concede, as indeed the relevant statistics indicate they must, that the Kalamazoo Public Schools are "racially unbalanced" and racially identifiable, and that within the ordinary understanding of citizens of the community there are black schools and there are white schools in Kalamazoo. In addition, defendants have made no real effort to deny, nor does this Court believe they could successfully deny, that as a result of this segregated condition of the schools, black school children are educationally deprived, intellectually stifled, and academically and psychologically uninspired. The gaping disparity of achievement levels between black and white schools cannot be rationalized without reference to the factor of racial isolation. Indeed, it was precisely because of the recognition of these detrimental effects on the quality education of minority groups students that the Kalamazoo Board rightly proceeded on a course of desegregation over four years ago.

Moreover, the United States in Brown recognized and ruled some seventeen years ago that segregated education is unequal education, that "segregation of white and colored children in public schools has a detrimental effect upon the colored children.

In further recognition of this seemingly self-evident principle, the State Board of Education of Michigan and the Michigan Civil Rights Commission have declared the following policy:

"Joint Policy Statement of the State Board of Education and Michigan Civil Rights Commission on Equality of Education Opportunity.

"In the field of public education, Michigan's Constitution and laws guarantee every citizen the right to equal educational opportunities without discrimination because of race, religion, color or national origin. Two departments of state government share responsibility for upholding this guarantee. The State Board of Education has a constitutional charge to provide leadership and general supervision over all public education, while the Michigan Civil Rights Commission is charged with securing and protecting the civil right to education.

"In addition to the declaration of public policy at the State level, the United States Supreme Court, in the case of *Brown* vs. *Board of Education*, ruled: 'that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal.'

"The State Board of Education and the Michigan Civil Rights Commission hold that segregation of students in educational programs seriously interferes with the achievement of the equal opportunity guarantees of this state and that segregated schools fail to provide maximum opportunity for the full development of human resources in a democratic society.

"The State Board of Education and the Civil Rights Commission jointly pledge themselves to the full use of their powers in working for the complete elimination of existing racial segregation and discrimination in Michigan's public schools. It shall be the declared policy of the State Board of Education that in programs administered, supervised, or controlled by the Department of Education, every effort shall be made to prevent and to eliminate segregation of children and staff on account of race or color.

"While recognizing that racial imbalance in Michigan schools is closely related to residential segregation patterns, the State Board of Education and the Civil Rights Commission propose that creative efforts by individual school districts are essential and can do much to reduce or eliminate segregation. Local school boards must consider the factor of racial balance along with other educational considerations in making decisions about selection of new school sites, expansion of present facilities, reorganization of school attendance districts, and the transfer of

pupils from overcrowded facilities. Each of these situations presents an opportunity for integration.

"The State Board of Education and the Civil Rights Commission emphasize also the importance of democratic personnel practices in achieving integration. This requires making affirmative efforts to attract members of minority groups. Staff integration is a necessary objective to be considered by administrators in recruiting, assigning, and promoting personnel. Fair employment practices are not only required by law: they are educationally sound.

"The State Board of Education and the Civil Rights Commission further urge local school districts to select instructional materials which encourage respect for diversity of social experience through text and illustrations and reflect the contributions of minority group members to our history and culture. A number of criteria are enumerated in 'Guidelines for the Selection of Human Relations Content in Textbooks,' published by the Michigan Department of Education.

"The State Board of Education and the Civil Rights Commission believe that data must be collected periodically to show the racial composition of student bodies and personnel in all public schools, as a base line against which future progress can be measured. Both agencies will begin next month to assemble information on the present situation.

"To implement these policies the State Board of Education has assigned staff of the Department of Education to work cooperatively with the Civil Rights Commission and local school authorities for the purpose of achieving integration at all levels of school activity. The Michigan Civil Rights Commission also stands ready to assist local school boards in defining problem areas and moving affirmatively to achieve quality integrated education.

"Adopted and signed this twenty-third Day of April, 1966," and it is signed by all of the members of the State Board of Education and the Michigan Civil Rights Commission. And I believe the Chairman of the Civil Rights Commission at that time was The Honorable John Feikens, who is presently a Uni-

ted States District Court Judge in the Eastern District of Michigan.

The 1963 Constitution of the State of Michigan provides as follows:

"ARTICLE VIII. Education.

"Encouragement of education. Section 1. Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.

"Free public elementary and secondary schools; discrimination. Section 2. The legislature shall maintain and support a system of free public elementary and secondary schools as defined by law. *Every school district shall provide for the education of its pupils without discrimination as to religion, creed, race, color or national origin.*

"State Board of Education; duties. Section 3. *Leadership and general supervision over all public education,* including adult education and instructional programs in state institutions, except as to institutions of higher education granting baccalaureate degrees, *is vested in a state board of education. It shall serve as the general planning and coordinating body for all public education,* including higher education, and shall advise the legislature as to the financial requirements in connection therewith."

Now, the emphasis I have underscored, and I am emphasing in my voice.

In addition, Article VI, Section 29, of the 1963 Constitution of the State of Michigan, provides as follows:

"Civil rights commission; members, term, duties, appropriation. Section 29. There is hereby established a civil rights commission which shall consist of eight persons, not more than four of whom shall be members of the same political party, who shall be appointed by the governor, by and with the advice and consent of the senate, for four-year terms not more than two of which shall expire in the same year. *It shall be the duty of the commission in a manner which may be prescribed by law to investigate alleged discrimination against any person because of*

religion, race, color or national origin in the enjoyment of the civil rights guaranteed by law and by this constitution, and to secure the equal protection of such civil rights without such discrimination."

The above joint statement of the Michigan State Board of Education and the Michigan Civil Rights Commission was adopted and implemented pursuant to the above constitutional provisions.

The above joint statement, that was the joint policy between the State Board of Education and Michigan Civil Rights Commission. They acted under the authority vested in them by the constitution of the people of the State of Michigan.

This Court finds as a matter of fact and law that the Kalamazoo School Board in facing up to the problems incident to the segregated conditions, acted in accord with and pursuant to the above-stated policy and directive of the Michigan State Board of Education and the Michigan Civil Rights Commission; and the Michigan State Board of Education does have the superintending control over the local boards of education.

And I find as a matter of fact and law that the opinion of Attorney Ford, when asked by the School Board whether it would be proper for it to seek guarantees from a builder that its project not enhance or add to racial segregation, was incorrect in his advice that the Board had no authority to act and that the Kalamazoo Board could disregard the State School Board's mandate. This is not the law.

The law in the State of Michigan vests in the State Board of Education superintending control over all education, elementary and secondary.

This is a distinguishing factor from *Deal*, a very important distinguishing factor from the *Deal* decision. We have two distinguishing factors, at least. One is that you have a board of education acting voluntarily. Well, that probably wasn't completely voluntarily because, in a sense, it was also in response to the mandate of the State Board of Education acting jointly with the Michigan Civil Service Commission. And I find that the

Board did adopt and establish a completely well-considered, deliberately considered, thoroughly considered plan of integration.

However, having in mind the directives of the Michigan State Board of Education, as elicited upon cross-examination from the testimony of Mr. Maynard C. Morgan, the facts have been established that the four elementary schools most recently situated and constructed by the Kalamazoo Board were established without any long view to improving racial balance in the schools, and contrary to the directive of the Michigan State Board of Education.

Northglade School was built by the Board in 1960. That was before the directive, but it was without a long view to improving racial balance in the schools. Northglade is a neighborhood school, and it was built in 1960, which was then racially mixed at that time but obviously in a state of transition racially. This was a flag to the Board, something had to be done about it.

Within less than eight years, that school was clearly black. It has been identified in court frequently as one of the five black elementary schools in Kalamazoo.

In 1959, two elementary schools, Winchell and Indian Prairie, were built in white areas with no view to improving the problem of racial segregation or directing the flow of students so as to reduce segregation.

These schools have consistently maintained a homogeneous white student body. The same is true of the Board's most recent construction effort, Arcadia School.

In each of the above instances, this Court finds that the Kalamazoo Board of Education failed to seize the opportunities it confronted and act affirmatively to relieve conditions of racial imbalance and the deprivation of educational opportunity which all agree has resulted therefrom. *[See Davis* vs. *Pontiac, P. 11, 13-14]*

There are other instances and strong indications in the present record of further such circumstances. These are largely reserved for a full hearing on the merits of this case, in accord-

ance with the stipulation of counsel and the order of this Court.

In this regard, Swann vs. Board of Education *402 U.S. 1, at 18*, teaches:

"In *Green*, we pointed out that existing policy and practice with regard to faculty, staff, transportation, extracurricular activities, and facilities were among the most important indicia of a segregated system, *391 U.S., at 435*. Independent of student assignment where it is possible to identify a 'white school' or a 'Negro school' simply by reference to the racial composition of teachers and staff, the quality of school buildings and equipment, or the organization of sports activities, a 'prima facie' case of violation of substantive constitutional rights under the Equal Protection Clause is shown.

"When a system has been dual in these respects, the first remedial responsibility of school authorities is to eliminate invidious racial distinctions."

As Judge Damond Keith observed in the *Davis* vs. *Pontiac* case, *Pages 13 & 14:*

"When the power to act is available, failure to take the necessary steps so as to negate or alleviate a situation which is harmful is as wrong as is the taking of an affirmative step to advance that situation. Sins of omission can be as serious as sins of commission."

Where a Board of Education has contributed and played a major role by reason of planning school locations and constructions which substantially contribute to the growth of a segregated situation, the Board is guilty of de jure segregation. "The fact that such came slowly and surreptitiously rather than by legislative pronouncement makes the situation no less evil." As I observed before, the net result of the total segregated situation in the school or the substantial segregated situation in the school is the same on the child, no matter what tag we attempt by legal reasoning to hang onto the situation.

And the loss and damage to the community and these United States from the continued accumulation of damage, unremitting damage to an important segment of our citizens cannot

be justified by any standard whatsoever, just the sheer loss of the ability of having good citizens, responsible citizens.

Now, against the background of all this seasoned, reasonable, documented social and educational theory, and the fact of racial separation and isolation in its own schools, the Kalamazoo presently duly elected Board members' response is: "We have a rationale, a reason not to act to correct this universally condemned educational environment; we have a legal out which exonerates us from legal responsibility in this area, namely, the claimed absence of state action which is a prerequisite to the relief predicated on the Fourteenth Amendment." The record in this case is clearly contrary.

Defendant's argument rests on the opinion of the Sixth Circuit Court of Appeals in the case of *Deal* vs. *Cincinnati Board of Education, 369 Federal 2d 55.* In that case the Court held that where there exists a situation of racial imbalance attributable entirely to residential patterns and not caused or perpetuated in any way by actions of the School Board, then the Board cannot be forced to implement a plan of integration.

In our case, of course, plaintiffs contend that the Board of Education is not so innocent of past discriminatory practices as to qualify under the factual premises of *Deal.* This complicated factual issue could not be adequately considered in the present exigent circumstances of a hearing on the question of a preliminary injunction in view of the immediate history in this case and the present pendency of the new school year and of the clear intent of a duly constituted Board to have the beginning of the implementation of desegregation at the beginning of this school year in September.

Hence, the Court is not in a position to rule on whether or not the Board had a constitutional duty to adopt the plan of May 7, 1971 at that time from a consideration of all of the evidence, because all of the evidence isn't in.

But, there appears to be substantial evidence in support of a finding of de jure segregation in this case.

Boards of Education cannot absolve themselves from responsibility for situations, such as I have described, when it had

the power and the duty and control to prevent the situation. "It would be feigned modesty on the part of a board of education to suggest that it is controlled by a situation. . ." that it cannot control. [See *Davis, supra*] A decision regarding the location of new schools is one for the Board, as the evidence in this case and as the law of this State clearly demonstrates this. It is for no one else to make that decision, but the School Board.

And, likewise, for a school board to acquiesce, even by inaction, in a housing development pattern, and then to disclaim liability for the eventual characteristic that such pattern created in the schools is for the Board to abrogate and ignore all power and control and responsibility. And the Boards are clothed with very substantial power, even the power to tax, in some instances; and with such authority vested in them, and such power in a community, a school board has tremendous influence upon the community and can influence the community very substantially, and does, across the country.

This Court can further observe that in May of 1971, and, in fact, since April of 1966, the Board did have a duty under *Article VIII, Section 3, of the Michigan Constitution of 1963* to obey the directives of the State School Board of Education quoted earlier by this Court.

It is also clear that prior to the adoption of the May 7th integration plan, both the State Board of Education and the local Board saw a federal constitutional obligation to take positive steps to disestablish the segregated system existing in Kalamazoo. Since these bodies were necessarily privy to the facts and data not yet available to this Court on this question, and since this question was one which was and is central to the matters of quality education within the responsibility of these bodies, their determinations and judgments must be respected by this Court.

Further, and more significantly, the posture of this action makes it clearly distinguishable from that considered by the Court in *Deal*. Here, a duly constituted Board, after much deliberation and under the mandate and instruction of the State Board of Education, did in fact take affirmative action. That was absent from *Deal*.

Leaving aside for a moment the question of whether or not the Board was under a duty to adopt that plan, the fact is that they did adopt a plan designed effectively to integrate the public schools and to at least begin to correct what it, upon careful consideration, saw to be the kind of deprivation and unconstitutional inequality censured in *Brown*. Cast in this context, the action of the newly elected Board on July 6, insofar as it served to delay and impede or obstruct the lawful implementation of the integrated plan of May 7th, was unconstitutional.

This Court finds that the posture of the present action is much more closely analogous to that presented to the Sixth Circuit in *Bradley* vs. *Milliken, 433 Federal 2d 897 (1970)* than it is to that presented in *Deal*. In *Bradley*, the Detroit Board of Education passed an integration plan which the State Legislature attempted to rescind. Defendant's own brief concedes at page 15 that in *Bradley* "the action of the Board of Education was within the discretionary power of the Board."

In *Bradley*, the Court held that the attempt by the State to rescind the prior Board attempt to integrate was unconstitutional. This ruling was made, as *Bradley* again teaches us, "without deciding the question of the merits of the plan of the Board or as to whether it was the constitutional obligation of the School Board to adopt all or any part of that plan."

The Court expressly distinguished *Deal* precisely on the ground that *Deal* did not pose the circumstances of affirmative Board action. Quoting from *Bradley:*

"In the present case the Detroit Board of Education in the exercise of its discretion took affirmative steps on its own initiative to effect an improved racial balance . . . ." At *page 904* of the Bradley case.

In this context, then, the Sixth Circuit teaches us that any attempt by an arm of the state government to impede an effort by a duly constituted school board to protect constitutional rights is itself state action which denies equal protection of the laws, or, more specifically, denies equal educational opportunity and quality education to black students in the black schools of Kalamazoo.

The *Bradley* ruling is quite specific:

"State action cannot be interposed to delay, obstruct or nullify steps lawfully taken for the purpose of protecting rights guaranteed by the Fourteenth Amendment." Page 903.

The steps of the School Board of May 7, 1971, were steps lawfully taken for the purpose of protecting rights guaranteed by the Fourteenth Amendment, and, therefore, the newly constituted Board is without Constitutional power to set aside that clear action designed to protect Fourteenth Amendment rights.

The July 6th resolution of the Kalamazoo Board of Education was such obstructive state action, reflecting, in circumstances remarkably similar to those in Bradley, popular expressions of community hostility channeled through school board elections.

The principle is deeply embedded in the very fabric of this Republic that constitutionally secured rights are not subject to popular referendum. Quote:

"The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections." *Board of Education* vs. *Barnette, 319 U.S. 624, at 638.*

The very role and defining purpose of the original Bill of Rights and all subsequently promulgated constitutional rights is that they are rights inherent to the preservation of man's dignity and liberty, so sacred as to be secured beyond the reach of the day-to-day vicissitudes of public opinion.

This nation is surely a democracy, but it is also more. It is a *Constitutional* democracy which hallows these basic rights which define a free people.

The right to equal educational opportunity, regardless of race, creed or color, is included in those sacred rights. No state

or popular effort to frustrate the fulfillment of that right can be allowed to stand.

In view of the above findings, it is hereby ordered that the resolution of the Kalamazoo Board of Education of July 6, 1971, delaying, impeding and stopping for one year the implementation of the plan of integration adopted by that same Board, only differently constituted on May 7, 1971, and establishing instead a voluntary open-enrollment plan of school attendance is unconstitutional and therefore void.

It is further ordered that the defendant Kalamazoo Board of Education be enjoined from acting in such a manner as to give effect to the substance of the said resolution of July 6, 1971.

It is further ordered, since any effort by defendants or other agents of the State to retard the implementation of the May 7th desegregation effort would necessarily suffer the same constitutional defects found in the contents of the July 6, 1971 Board resolution, that the school attendance plan promulgated by the Kalamazoo Board of Education on May 7, 1971, pursuant to the April 23, 1966 directive of the State Board of Education and the Michigan Civil Rights Commission, be implemented immediately, and immediate steps should be taken to see to it that that duly constituted, properly legal constitutional act by this School Board on May 7th be carried out.

And let me here observe that it is not this Court's Plan, that this Court is not abusing its discretion or overreaching. Quite the contrary, this Court is honoring the fully, fairly, openly, frankly, deliberately considered plan of desegregation by a competent, capable, courageous School Board.

The Court hereby retains jurisdiction of this cause pending a full trial on the merits of plaintiffs' contentions regarding past acts of discrimination by the defendants, and, likewise, for the purpose of examining the plan in any particulars to see if they are impinging the rights of others in any way, any unconstitutional way. In other words, that all the parties will have an opportunity to present any impingement of constitutional rights.

Since there appears to the Court insufficient grounds at the present time, that is, I don't have any facts before me as to any construction plans that are under way, making way or contemplated, since none of that is before the Court, I hereby deny the plaintiffs' request in this respect subject, however, to any further presentation of the necessity for action, if any there be.

And likewise the request for directing faculty and staff assignment is denied because there is nothing before the Court upon which it could legitimately act in this respect.

A temporary injunction in accordance with this decree, or of this opinion, may be prepared for presentation as the judgment of this Court and order of this Court.

I have made my findings of facts and conclusions of law embodied in this opinion from the bench, and I therefore submit that I have complied with all of the Federal Rules with respect to making findings of facts and conclusions of law.

I again reiterate that I will review the transcript of this opinion from the bench for the reasons which I have stated, and make any corrections before the final draft. I would do this if I were dictating the opinion. I would read the draft over.

I have tried to accomodate the parties to expedite disposition of this case so that all the rights of the parties may be protected.

MR. KRIEKARD: If it please the Court, in compliance with Rule 8 of the Rules for Appeal of the Federal District Courts, we are required to first seek a stay from this Court of the order just entered. We do hereby seek such stay from this Court.

THE COURT: From what I have stated in the opinion and the findings of fact, I would have to deny the stay.

It is my judgment that this was a thoroughly correctly constitutional act by the Board, and sustainable on all grounds. And the compelling necessity to get this 1971 school year off right also compels me to deny the request for stay.

It is my considered judgment that this well-considered plan ought not to be further impeded. But 17 years after *Brown*, I think the mandates of *Alexander* vs. *Holmes* should apply to this case, the mandate of now. And that implicit in the plan of the newly constituted Board was the concept of deliberate speed, which Alexander finds is no longer constitutionally permissable; that in situations of this kind, the action is "eo instanti," now.

MR. JACKSON: May it please the Court, in view of the fact that his Honor has indicated that he might make some minor modifications in the findings that were delivered from the bench, may we assume, your Honor, that were we to reapply following any change in the order as announced tonight, for a stay, that the same would be denied, so that we may have that firmly established?

THE COURT: Yes, you may assume that, because I don't think any changes I would make in the language or rephrasing of the sentence would in any way affect the judgment of the Court at this time.

MR. JACKSON: Thank you, your Honor.

MR. JONES: Your Honor, if I may move that the Court include in its order – and I premise this upon the premise in the record of testimony of hostility, of very strong polarization – that any and all persons, whether employees of the School Board or whether members of the School Board, be enjoined by this Court from any acts of hindrance or opposition –

THE COURT: That is contemplated in the injunction, yes, that the acts of opposition or hindrance to the implementation of the plan, and, likewise in this accord, ought to avoid any repetition of instances such as the forced resignation of a – what this record shows was obviously a very dedicated servant; that there should not be any repercussions of this kind of action.

It is presumed that these employees, no one should be penalized for performing his constitutional duties and for living up to his oath of supporting the Constitution and the laws of the United States and the State of Michigan. No one should ever be

punished under that kind of circumstance.

Absolutely, when I took the oath, when you took the oath, you who are public officials, you took the oath to support the Constitution and the laws of the United States.

And I find as a matter of fact and law that what the School Board and its Superintendent and officers did with reference to this resolution on May 7th and its implementation was fully in accord with conformity to the very sacred oath that they took when they assumed office.

MR. JONES: You Honor, if I may, in view of the testimony of Dr. Pattison, some portions of it, move the Court to – and perhaps it is a part of the Court's order already, but I would like to have it stated, if possible, that the School Board and personnel move forward in good faith to carry out the various subsidiary aspects of the plan which will facilitate the implementation of the plan in a peaceful and harmonious way.

THE COURT: That should be done. That is the contemplation of the Court. It is implicit in the order of the Court. But if there is any precipitous firing of employees, the Court doors are open to listen to the testimony in the case, because no one should ever be fired for doing their responsibility under the law.

Thank you, gentlemen.

(At 11:35 p.m. on Friday, August 20, 1971, the hearing was adjourned.)

The following footnotes have been added for the purpose of clarification of the findings of fact and conclusions of law in this Temporary Injunction:

1. Change 23 percent to "17.6 percent," according to 1970 school census.

2. Change four to "three" years. However, as early as 1962, according to the testimony of Mr. Smith, beginning with the 1962 Citizens' Report, conclusions of the Superintendent and his staff, the Board was preparing for its ultimate action of May 7, 1971.

3. Change legal to "de jure."

4. The court notes that Dr. Cochran, former Superintendent of Schools, was pressured into resigning his position because of his part in the preparation and attempted execution of the May 7th plan. This firing sent a chill through the personnel of the entire school system – it was a clear message. This chilling effect was evidenced in the testimony of school system employees, particularly that of Lutz. See opinion pp. 19, 43, 44, 45. The court believes that the 44 bus requirement testified to by Lutz is an absolute maximum and notes, again, the testimony of both the present and past Superintendents of Schools that the May 7th plan can still be implemented by the opening of this school year. Lutz himself admitted this in his testimony that busing under the May 7th plan is still within the realm of possibility.

   Both Superintendents, past and present, are experienced in busing school children and have engaged in busing for the last five years. Last year approximately 6000 students were bused – 1900 by the Kalamazoo school system and 3100 by the City. Therefore, when these men conclude that busing can be accomplished by September 7, such conclusions are entitled to substantial credibility. Implicit is their knowledge of scheduling and multiple runs.

   In addition, Clayton L. Richardson, manager of Metro Transit, the city bus system, on cross-examination, testified that the City bus system was operating under capacity, that the capacity per bus was 45, and that the per-bus run was approximately 15 passengers.

   He further testified that he was in pursuit of additional passenger traffic from the school system. He also testified that Kalamazoo has been selected for a federally funded mass transit program and was destined to obtain a substantial increase in passenger transportation facilities.

5. The Fourteenth Amendment reads in relevant part as follows: "No State shall . . .; nor *deny* to any person within its jurisdiction the equal protection of the laws." (Emphasis

Webster's New Collegiate Dictionary defines "deny" as follows:

> de-ny' (dē-nī') *v.t.*; DE-NIED' (-nīd'); DE-NY'ING. [OF. *denier, denegare*, fr. L. *denegare*, fr. *de+negare* to deny.] 1. To declare not to be true; contradict. 2. To refuse to grant, gratify, or yield to; as to *deny* a request. 3. To disclaim connection with or responsibility for; to disavow. 4. *archaic*. To refuse (to do, or accept, something); decline. 5. To refuse access to (one called on); to represent as "not at home"; as, she *denied* herself to callers. 6. To react as a false conception; as to *deny* man's free will.
> *deny oneself*. To practice self-denial.
> **Syn.** Deny, gainsay, contradict, negative, traverse, impugn, contravene mean to declare untrue or to go coupter to the truth. Deny commonly implies a refusal to accept a statement as true; gainsay implies a disputing the truth of what has been said or the integrity of the person saying it; contradict implies an open or flat denial by suggesting the statement's (or the speaker's, etc.) running counter to the truth; negative, a milder term, implies refusal to assent; traverse, chiefly a legal term, implies a formal denial of truth; impugn stresses an attack upon the truth of a statement or of a person making it; contravene stresses a running into conflict between what has been said or taught (and, in law, done) and things as they are. –*Ant*. Concede.

IT IS THEREFORE ORDERED that the resolution of the Kalamazoo Board of Education of July 6, 1971, delaying, impeding and halting for one year the implementation of the plan of integration, and establishing instead a voluntary "open enrollment plan" of school attendance is unconstitutional and is therefore void. The Board of Education, its agents and other persons acting in concert with them are hereby enjoined and restrained from giving any force or effect to said resolution.

IT IS FURTHER ORDERED that the school attendance plan promulgated by the Kalamazoo Board of Education on May

7, pursuant to the April 23, 1966 directive of the State Board of Education and the Michigan Civil Rights Commission, be implemented immediately, thereby restoring the rights of plaintiffs and members of their class to their status prior to the adoption of the July 6, 1971 resolution, and preserving same until a full hearing on the merits, or further order of this Court.

IT IS FURTHER ORDERED that the Kalamazoo Board of Education fully and immediately carry out the implementation of the May 7 resolution, that it become completely and fully effective at the beginning of the September, 1971-1972 school year. The Board of Education is also enjoined to carry out the order of this Court in good faith and to implement the various subsidiary aspects of the May 7 resolution. Further, there shall be no precipitious firing of employees as a result of their attempting to carry out the order of this Court or carry into operation the plan of desegregation.

IT IS SO ORDERED.

Dated: August 25, 1971.

/s/ NOEL P. Fox
Chief District Judge

Filed October 8, 1971
Docket No. 36

UNITED STATES OF AMERICA
IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHELLE OLIVER, by her Father and Next Friend, ROBERT JONES; DAWN KIRK, STEPEHN KIRK and KIMBERLY KIRK, by their Father and Next Friend, WYATT KIRK; LEAH ROBIN and Paul ROBIN, by their Father and Next Friend, STANLEY ROBIN; TIMOTHY SMITH, by his Mother and Next Friend, KAREN MILLER; SCOTT ODOM, by his Mother and Next Friend, SUE ODOM; LISA MILLER, by her Mother and Next Friend, MARGARET MILLER; STEPHEN PULASKI, LEAH PULASKI, and MARK PULASKI, by their Mother and Next Friend, EDITH PULASKI; JOHN FLYNN, DR. DONALD MAY and JOHN VAN ZOEREN, Parents, are all parents or minor children thereof attending schools in the Kalamazoo Public School System; THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, KALAMAZOO BRANCH,

Plaintiffs,

v.

K-88-71 C.A.

KALAMAZOO BOARD OF EDUCATION, a body corporate; EDWARD P. THOMPSON, ANDREW C. LUFF, A. T. LUEY, JACK HOEKSTRA, DR. DALE PATTISON, NORMAN BRUEX, ALLAN TYLER, members of the BOARD OF EDUCATION OF THE CITY OF KALAMAZOO; REED HAGEN, Acting Superintendent of the Kalamazoo Public Schools; MICHIGAN STATE BOARD OF EDUCATION, a constitutional Body Corporate; JOHN W. PORTER, Acting Superintendent of Public Instruction, Depart-

Continued

ment of Public Instruction, Department of Education and ex Officio Chairman of Michigan State Board of Education,

Defendants.

MEMORANDUM OPINION AND MODIFIED PRELIMINARY INJUNCTION

On May 7, 1971, the defendant Kalamazoo Board of Education, after more than three years of preparation and study, directed the implementation of a program of redefinition of school attendance zone boundaries so as to effect desegregation of the Kalamazoo Public Schools. This action consummated the final stage of a comprehensive plan designed to mitigate and ultimately remedy unequal educational opportunities being provided in the Kalamazoo system to black and white children.

On July 6, 1971, following a heated school board election, a newly constituted board reflected widespread community hostility to the desegregation plan and moved to suspend it. This court, by its preliminary injunctive order of August 20, 1971, avoided the July 6 effort to "turn back the pages" and reimpose segregated conditions as unconstitutional and enjoined interference with what has been designated the "May 7 Plan," reserving jurisdiction to make whatever further modifications in its order that might become necessary.

On August 30, 1971, the same day that the Sixth Circuit Court of Appeals affirmed the order of this court, the Kalamazoo electorate again rejected a school board millage request. Responding to the financial pressures imposed by the millage defeat, the defendant school board voted to curtail several school programs and services and to terminate the employment of all teaching personnel on probationary status. Some 103 teachers and counselors received "pink slips" pursuant to this board action, indicating that they would be dismissed following the completion of the October 1 school day. In addition, 35.5 school library assistants were pink-slipped. Of the 103 teachers and counselors affected, 26 are black. Should these teachers leave the Kalamazoo system, the black population of the teaching staff would be cut in half, from 8% to roughly 4%.

Petitioners here challenge the Board effort to dismiss the nontenure teachers. They claim that such action is economically unnecessary, would emasculate the desegregation program in the Kalamazoo schools and would irreparably regress Kalamazoo educational opportunities to a condition of inequality, in direct contravention of this court's earlier order.

The defendant school board replies that this court has no jurisdiction to entertain plaintiffs' petition since the earlier order which is the basis of asserted jurisdiction was directed only to the comingling of students and did not relate to the teaching staff. Defendants further argue that even should jurisdiction be assumed, the challenged action of the school board was a reflection of a judgment of policy, legislative in nature, and therefore within the exclusive power of the school board to implement.

Stressed from the very beginning of the proceedings in this matter has been the crucial role in the Kalamazoo desegregation effort of a substantial increase in minority group teachers and counselors. Well before the previous school board directed the integration of student bodies, it commenced an active, expensive and very difficult recruitment program in an effort of fill this key need.

This court made the finding in its earlier opinion that the previous school board recognized a startling paucity of black staff in September of 1969 and directed the hiring of more black teachers as a part of its implementation of Phase I of the three-phase desegregation program outlined in the August opinion of this court.

It was recognized by the Citizen's Racial Balance Committee and the school board in 1969, and by this court in its earlier ruling, that an able and substantially integrated faculty and staff was and is an indispensible prerequisite to meaningful integrated education, and essential to an uprooting of the vestiges of segregation.

It has surely been self-evident throughout these proceedings that the mere intermingling of black and white children is not an end in itself. Equal educational opportunity is and always has been the Constitutional objective of this and every court dealing with Fourteenth Amendment rights school cases. While busing may be a necessary tool to attain this objective, a racially sensitive and integrated teaching staff is fundamental.

To belabor the obvious clarity of this principle, it may be observed that the plaintiffs, in the original proceedings, requested the court to order that the teaching staff not be assigned to schools within the Kalamazoo system in a racially unbalanced manner. Since such relief was not shown by the evidence to be necessary then, it was not granted. However, the power of the court to grant such relief upon a proper showing of infringement of constitutionally protected rights in teacher assignment practices cannot be successfully questioned. It surely must follow, as day does night, that if a school district can be ordered to "cease and desist" from constitutionally impermissible unbalanced distributions of teachers throughout the system, it can be ordered to "cease and desist" from blanketly dismissing a substantial proportion of the black teachers, upon a proper showing of an invasion of constitutionally secured rights. Plaintiffs' complaint and the evidence establish defendant school board's action in discharging teachers in the name of a financial crisis is state action, which is constitutionally impermissible because of its invasion of rights secured by the Fourteenth Amendment.

This court has jurisdiction and authority to grant relief in this case.

In the Sixth Circuit's order affirming the preliminary injunction issued in this case, the Court stated:

> "The District Judge is authorized to make such modifications in the plan implemented by the interlocutory injunction as he may find to be appropriate." *Citing Davis* v. *School District of Pontiac*, 443 F.2d 573, at 577.

The Davis case involved a similar authorization to the District Judge. There, the Sixth Circuit said:

> "The court may, in its discretion, allow the parties to submit alternative plans or propose amendments to the adopted plan, or may consider such other relief as may be appropriate." *Citing Swann* v. *Charlotte-Mecklenburg*, 91 S.Ct. 1267, 28 L.Ed.2d 554.

The Swann case dealt, in part, with the scope of the powers of federal courts to accomplish desegregation. That portion of the Swann opinion footnoted by the Sixth Circuit reads as follows:

"The objective today remains to eliminate from the public schools all vestiges of state-imposed segregation. Segregation was the evil struck down by *Brown I* as contrary to the equal protection guarantees of the Constitution. That was the violation sought to be corrected by the remedial measures of *Brown II*. That was the basis for the holding in *Green* that school authorities are 'clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.' 391 U.S., at 437-438.

"If school authorities fail in their affirmative obligations under these holdings, judicial authority may be invoked. Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." 402 U.S., at 15.

In February 1803, Chief Justice John Marshall, one of the greatest Chief Justices in our nation's history, in the case of *Marbury* v. *Madison*, 5 U.S. 137, 176 (1 Cranch. 137-176), taught all of us:

"The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or that the legislature may later the constitution by an ordinary act.

* * *

"Certainly, all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently, the theory of every such government must be, that an act of the legislature,

repugnant to the constitution, is void. This theory is essentially attached to a written constitution, and is, consequently, to be considered, by this court, as one of the fundamental principles of our society.

* * *

"It is, emphatically, the province and duty of the judicial department, to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So, if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case, conformable to the law, disregarding the constitution; or conformable to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case: *this is of the very essence of judicial duty.* If then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply.

"Those, then, who controvert the principle, that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law. This doctrine would subvert the very foundation of all written constitutions." (Emphasis supplied.)

The actions drawn in issue in plaintiffs' petitions are the actions of a quasi-administrative legislative body. This court in reaching its decision *is in the discharge of the very essence of its judicial duty.*

Upon a full two-day evidenciary hearing on this matter, the following facts have emerged from the testimony of numerous Kalamazoo teachers, principals, administrators and financial experts. Financially, the school board stands to save some approximately $864,000 by dismissing the teachers. Specifically, the board will save $5,600 for every day the teachers are gone. Among other expenditures presently budgeted for the remainder of the 1971-1972

school year by the board is roughly $600,000 allocated to the operation of the Kalamazoo Public Library which is wholly financed through the school system.

The previously mentioned recruitment effort which brought the presently imperiled teaches to Kalamazoo was a massive and expensive one. Over twenty recruiting trips to southern colleges and universities were sponsored by the school board. The efforts of school personnel, Western Michigan University educators and recruiters, interested private parties and personnel from the local Upjohn Company were aggregated and coordinated. Even this great effort met with only limited success. The objective was to attain a black staff proportionate in numbers, roughly, to the proportion of black students – 17%. Unfortunately, diligent efforts were only able to generate a staff roughly 8% black. Witnesses have testified that from two to fifteen years would be required just to recoup the loss of these teachers, should the dismissals be implemented. Competition for black teachers between prospective employers, school systems and private enterprise, is very keen. Teacher applicants are able to carefully evaluate factors of environment, job stability, and financial incentives. The firing of freshly recruited black teachers can only damage the reputation of the Kalamazoo system amongst potential recruits. The dismissals may well also result in the permanent loss of the discharged teachers to other school systems or private industry. These new recruits are to receive the brunt of the school board's dismissal action, since they are, in large numbers, without sufficient seniority to have attained sanctified tenure status.

The loss of these teachers to the Kalamazoo system will have, as indicated by the vast weight of the evidence presented to this court, a devastating effect on the desegregation program originally implemented by the previous school board and enforced by this court's order. The unanimous opinion of all who testified was that these dismissals would literally "tear the heart out of the desegregation plan." These opinions were well supported by cogent explanatory analysis.

The evidence vividly elucidated the utility of black teachers, by simple virtue of their blackness, as role models for black children accustomed to feeling that their own blackness mades them

inferior people. The evidence further showed how the presence of black and white staff members sensitive to problems of communication between the races helps to free children's minds to learning by increasing their faith and confidence in the school as an institution and by diminishing the likelihood of racial tensions fostered by lack of understanding.

The impact of significant numbers of black teachers on the capability and understanding of fellow white teachers is also a vital integral aspect of the relevance of an integrated faculty to the provision of equal educational opportunities. The fact that parent attitudes and confidences are necessarily broadened and improved, so essential to harmony, is also a relevant element in the total educational picture. The peculiar need of disadvantaged children for the assistance of library facilities is likewise central to adequate provision of equal educational opportunities.

Finally, the record establishes that the white teachers and counselors have been recruited as individuals who possess a high degree of sensitivity to the concerns and needs of a heterogeneous student population. The loss of such personnel would similarly jeopardize the Fourteenth Amendment secured rights of the plaintiffs in this action.

The board of education of any school district has the power as a duly constituted legislative body to formulate policy in the management of the school system charged to its responsibility. Judgments as to fiscal policy are authorized under this power. However, these judgments are subject to the review of the courts when they are found to infringe constitutional rights. Whenever a school board is faced with two alternative courses of action, one of which will necessarily impinge upon the provision of Fourteenth Amendment equal educational opportunities to *all* children within the school district and the other of which will not, the board is not free to pursue the former course. Any attempt by it to do so can and should be striken by the courts.

The evidence strongly indicates that when the board made the decision to fire the teachers and thereby, in effect sabotage the integration effort, in lieu of closing down the library, the members of the board did not even consider the effect of their decision on

the constitutional rights of the students as construed by the courts. Such a condition further minimizes this court's deference to the decision of the board.

It is very clear that presently funds are available from the library budget to maintain the 103 teachers and 35.5 school library workers in the Kalamazoo school system at least through the first semester of this school year. In addition, some $100,000 have been provided by way of private gifts for the purpose of helping retain black teachers. To effectuate this gift, it is necessary for the Kalamazoo City Education Association and the school administrative authorities to negotiate acceptance of the racial condition.

The State Board of Education and Dr. John W. Porter, Superintendent of Public Instruction, as parties defendant, have stipulated with the parties and to this court that they will advise the legislature of the State of Michigan as to the financial condition of the School Board of Kalamazoo and will submit to this court a report within sixty days indicating what State of Michigan action, if any, has been accomplished to assist in meeting the funding problems of the Kalamazoo School District.

In addition, defendant State Board of Education and Dr. John W. Porter, Superintendent of Public Instruction, will obtain and submit to the court within a sixty-day period an opinion from the Attorney General of the State of Michigan as to the application of his opinion No. 4673 and the restrictions on borrowing therein, to the School Board of Kalamazoo, in view of the orders and injunctions granted in this case.

Likewise, the defendant Kalamazoo School Board has voluntarily agreed to report to this court within sixty days on the status of all efforts to obtain additional reveneus for the purpose of funding the remainder of the school year.

In addition, the Chamber of Commerce of the City of Kalamazoo and others have urged the school board to conduct a new millage election. On Monday night, October 4, 1971, the school board unanimously voted to conduct a new millage election on Monday, November 22, 1971.

The efforts of the State Board of Education and the local

school board are directed to obtain the necessary legislative authorization to make funds, if any are voted at the millage election, available for use in the current school year.

On Tuesday and Wednesday, November 23 and 24, 1971, this court will conduct hearings to review the then present status of the Kalamazoo school board's funding problems and re-evaluate funding alternatives then available to the Kalamazoo school system for the remainder of the school year, devoting special attention to the effect of application of the 180-day attendance rule established by the State Board of Education.

The findings of fact and conclusions of law contained in this opinion are obedient to the provisions of Rule 52(a) of the Federal Rules of Civil Procedure. Likewise, the preliminary injunctive provisions herein entered are made pursuant to Rule 65(d) of the Federal Rules of Civil Procedure.

The preliminary injunction of this court heretofore issued on August 20-25, 1971 is hereby amended to include the following additional injunctive provisions:

IT IS THEREFORE ORDERED that the defendant Kalamazoo Board of Education cease and desist from the dismissal of any of the 103 teachers and counselors and the 35.5 school library assistants who received "pink slips" on September 20, 1971, and if any of these employees are presently off the payroll, the defendant Kalamazoo Board of Education is hereby ordered to reemploy them, until the further order of this court.

IT IS FURTHER ORDERED that the defendant Kalamazoo Board of Education, through its officers and agents, negotiate to agreement with the Kalamazoo City Education Association regarding terms of acceptance of the $100,000 gift donated to the Kalamazoo schools for the purpose of funding the salaries of 12 black teachers presently holding "pink slips," and that these named parties report to this court within ten days as to the progress of these negotiations.

IT IS FURTHER ORDERED that the defendant Kalamazoo Board of Education obtain whatever additional funds are required to presently employ the above-designated pink-slipped employees

from funds presently budgeted for the maintenance of general public access to the Kalamazoo Public Library.

IT IS FURTHER ORDERED that on November 23, and 24, 1971, this court will conduct hearings for the purpose of reviewing the financial condition of the Kalamazoo School Board as of that date.

Dated: October 7th, 1971.

/s/ NOEL P. FOX
Noel P. Fox
Chief District Judge

Filed April 28, 1972
Docket No. 93

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

MICHELLE OLIVER, ETC., ET AL., ***Plaintiffs,*** **vs.** **KALAMAZOO BOARD OF EDUCATION, ETC., ET AL.,** ***Defendants.***	**Motion For Protective Order** **No. K88-71**

Plaintiffs move this Court for an Order forbidding the taking of the depositions of Edward P. Thompson and Dr. Andrew C. Luff pursuant to Notice of Taking Deposition served by Defendant Kalamazoo Board of Education dated April 3, 1972, on the grounds that:

1. The examination by Defendant of prior members of the Board (Messrs. Schma and Thomas) who supported the racial balance plan ordered implemented by this Court was conducted in such a manner as unreasonably to annoy, embarrass and harass proponents of the racial balance plan and the Court should not permit further harassment of proponents of the racial balance plan.

2. Defendant has examined two prior members of the Board of Education who supported the racial balance plan and has had the opportunity to examine the members of the Board opposed to the plan and has had, therefore, adequate discovery by deposition of proponent and opponent members of the Board.

3. The persons which Defendant Board of Education seeks to examine are members of the Defendant Board of Education.

In the alternative, Plaintiffs move that the depositions of Edward P. Thompson and Dr. Andrew C. Luff be limited:

1. To matters which are not of public record, and

2. To examination by direct examination and not by cross-examination.

HOWARD & HOWARD
Attorneys for Plaintiffs

By: /s/ PHILIP L. HUMMER
Philip L. Hummer

407 The Kalamazoo Building
Kalamazoo, Michigan 49006
(616) 382-1483

Date: April 26, 1972.

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHELLE OLIVER, ETC., ET AL., ***Plaintiffs,*** **vs.** **KALAMAZOO BOARD OF EDUCATION, ETC., ET AL.,** ***Defendants.***	**Affidavit No. K88-71**

Philip L. Hummer being duly sworn deposes and says:

1. I am the member of the firm of Howard & Howard, attorneys for Plaintiffs herein. I am familiar with the facts hereinafter set forth and make this Affidavit in support of Plaintiffs' motion for a protective order with respect to the depositions noticed by Defendant Kalamazoo Board of Education of Edward P. Thompson and Dr. Andrew C. Luff.

2. The racial balance plan ordered implemented by this Court was adopted by the Kalamazoo Board of Education on May 7, 1971. The members of the Board voting for the plan were Messrs. Thompson, Luff, Schma and Thomas. Mr. Schma and Mr. Thomas did not run for re-election in the spring of 1971. The persons which Defendant seeks to examine, Mr. Thompson and Dr. Luff, were on the Board at the time of adoption of the racial balance plan and are present members of the Defendant Board of Education.

3. Defendant Kalamazoo Board of Education has examined two of its prior members who supported the plan, Mr. Schma and Mr. Thomas. Those depositions were conducted in hostile and accusatory manner (the transcripts of those depositions will be submitted to the Court as soon as they are available). The Court should not permit further harassment of other proponents of the racial balance plan.

4. In addition to the depositions already conducted by the Defendant, Plaintiffs have taken the depositions of Messrs. Luey, Tyler, Hoekstra and Pattison, present members of the Defendant

Board who oppose the May 7 plan. As a result of the depositions already taken, it is submitted that the Defendant has had adequate discovery by deposition of proponent and opponent members of the Board. In this regard, it should be noted that counsel for the Defendant Kalamazoo Board of Education has full access to all of the records and personnel of the Kalamazoo School System and has served as counsel for the Board for a great many years. Moreover, counsel for the Defendant Board of Education defended the Board in a prior State Court action in which an injunction to preclude adoption of the racial balance plan was sought. In view of these facts, it is submitted that the proposed depositions are not sought for legitimate discovery purposes but are proposed to harass and annoy proponents of the racial balance plan.

5. If the Court determines that it would be appropriate for the depositions to be held, it is submitted that the depositions should be limited to matters which are not of public record (e.g. matters occurring at executive sessions) and further, that the depositions should only be conducted by direct rather than cross-examination.

HOWARD & HOWARD

By: /s/ PHILIP L. HUMMER

Philip L. Hummer
Attorneys for Plaintiffs
407 The Kalamazoo Bldg.
Kalamazoo, Michigan 49006

Date: April 26, 1972.

Subscribed and sworn to before me
this 26th day of April, 1972.

_____

Notary Public

Kalamazoo County, Michigan
My commission expires: May 23, 1972

Filed July 26, 1972
Docket No. 111

UNITED STATES OF AMERICA
IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHELLE OLIVER, et al., ***Plaintiffs,*** **v.** **KALAMAZOO BOARD OF EDUCATION, et al.,** ***Defendants.***	**K-88-71 C.A.**

OPINION

Presently before the court in this school desegregation case is the plaintiffs' motion for a protective order which would regulate or bar defendants from taking the discovery depositions of two members of the School Board, Dr. Andrew Luff and Mr. Edward Thompson, who were members of the defendant Board on May 7, 1971, when the attendance zone plan presently in issue before this court was adopted.

This motion raises the issue of whether defense counsel, in light of their past representation of defendant Board, are likely to discover any facts relevant to this case by taking the testimony of the proposed deponents.

In considering the corollary question of whether the taking of the contested depositions would be likely to prompt needless annoyance, harassment and friction, the court is concerned with the further issues of whether the law firm of Ford Kriekard, Staton and Allen, hereinafter referred to as "the Ford firm," should properly conduct these depositions, even if authorized, in view of the past and present attorney-client relationship.

With regard to the defendant's right to take the depositions of Dr. Luff and Mr. Thompson, the court is persuaded that in view of the central role played by these men in the Board action here

contested and the likelihood of their appearance as witnesses in the ultimate trial of this cause, discovery depositions are appropriate.

However, the basic concern beneath plaintiffs' motion for protective order does appear to the court well founded in view of the current circumstances in this case. This legitimate concern springs not from the mere prospect of examination, but rather from the prospect of examination by the same attorneys who for over twenty years have acted as counsel and fiduciary to the Board and, necessarily, individuals acting in their official capacities as Board members, which members actually constitute the School Board. Board members are named as parties to this action, so that the reality of the personality of the living Board would be jurisdictionally before the court. In this sense defendant counsels owe a duty to these named Board members.

During the entire period of their service on the Kalamazoo Board of Education, including the period during which the Board considered and adopted the May 7th plan of school desegregation, Dr. Luff and Mr. Thompson enjoyed an attorney-client relationship with the Ford firm with respect to the School Board's activities. The court must presume that confidences and opinions were shared between these Board members and the Board's counsel. That these individuals now resent counsel employing such confidences and such relationship in a detailed and, now, antagonistic manner is not surprising.

In due respect for the civility of the situation, such turnabout should have been avoided.

Counsel for the Board has urged that they have never represented the individuals, and they continue to urge that they do not represent the individuals; just the entity of the Board.

While this may be mechanically true and a mechanical interpretation of the law, the fact remains that the Board of Education cannot and does not exist in a vacuum. It can exist only through its living human being members acting in their official capacities, and in no other way. It just does not exist in thin air.

An attorney representing a school board should owe a duty

of confidentiality to persons who are the only available conduit of information between the client corporate body entity and the attorney.

The long recognized fundamental principle of confidential attorney-client communications and relations can have no meaning absent recognition of the role of human interaction. The concept of an insensible artificial entity as the sole client, while useful and appropriate for many purposes, dehumanizes the attorney-client relationship and emasculates the attorney and client privilege if applied in this area blindly without flexibility.

The court is aware of the citations and the American Bar Association's Code of Ethics, ethical consideration 5-18 and 5-15 cited by defendants in their brief.

The defendants urge upon the court that there is no code in this area. (The law is an axiological, not a mechanical science.)

In an early case, In re Boone, 83 Fed. 944 (Circuit Court, N.D. California, No. 12,455, December 7, 1897), the Court stated:

> "This general and well-settled rule is not found in any positive enactment. Indeed none is necessary. It springs from the very nature and necessity of the relation of attorney and client and finds its highest sanction in the confidential character of the relationship." (At 953.)

As the Court long ago said in the Boone case:

> "The relation of attorney and client is one of mutual trust, confidence, and good will." (At 953.)

Only human beings are capable of mutual trust, confidence and good will. An artificial body corporate has no such capability.

Given this relationship, tensions, which otherwise might well be avoided, can be expected when a client's entity's official spokesman and representative is confronted by the counselor-turned inquisitor.

In light of the circumstances of this case and the considerations set forth above, this court finds that, while disqualification of the Ford firm from further activities in this case is inadvisable

some supervision over the depositions of Dr. Luff and Mr. Thompson is called for.

The most advisable course is for other attorneys than members of the Ford firm to conduct the depositions. And I am sure there are able attorneys in the Kalamazoo area who can quickly adjust themselves to the fact situations sufficiently to conduct such depositions.

(The court finds authority for this ruling in the administrative discretion conferred upon federal trial courts by Rules 1, 16, 30(d) and 83 of the Federal Rules of Civil Procedure.[1])

With regard to the manner of taking of depositions by such attorneys, the applicable discovery rules permit quite broad latitude. Rule 30(c) of the Federal Rules of Civil Procedure even permits the asking of questions which might be objectionable at trial, since the sole purpose is the re-evaluation of the relevant facts as well as irrelevant facts which may lead counsel to relevant facts for background purposes as distinguished from formal presentation to a trier of facts. Such flexibility in the form of questions does not appear prejudicial, since only a discovery deposition is involved. No jury will ever, even ultimately, enter into the picture on those questions which may be irrelevant. They will only be referred to in those areas which are actually relevant.

With regard to the ethical issue, the court finds that the Ford firm has violated no principle of the American Bar Association's Canons of Ethics, and because of the present posture of the case, they should remain and participate in the trial of the cause, conduct it.

Dated: July 26, 1972.

/s/ NOEL P. FOX
Chief District Judge

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[1] See Wright & Miller, Federal Practice and Procedure, Civil §1029.

Filed August 2, 1972
Docket No. 117

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

MICHELLE OLIVER, et al. ***Plaintiffs,*** **vs.** **KALAMAZOO BOARD OF EDUCATION, et al,** ***Defendants.***	**Motion To Recuse** **File No. K88 - 71**

The Defendant, Kalamazoo Board of Education, moves the Honorable Noel P. Fox to recuse himself; to proceed no further in this cause than permitted under Title 28, Section 144 USCA to initiate such procedural steps as is necessary to cause another Judge to hear their cause.

This this motion is made under and based upon Title 28, Section 144 USCA, and is made on the grounds and for the reason that the Honorable Noel P. Fox has personal bias and prejudice in favor of Plaintiff and against the Kalamazoo Board of Education within the meaning of said Title and Section.

That this motion is based on facts and reasons more fully set forth in the Affidavit of the Kalamazoo Board of Education filed on its behalf by its President, Allan P. Tyler, which said Affidavit is filed along with and in support of this motion under Title 28, Section 144 USCA.

/s/ ARTHUR STATON, JR.
Arthur Staton, Jr.
Attorney for Defendant

Business Address:
1015 American National Bank Building
Kalamazoo, Michigan 49006

DATED: August 1, 1972

Filed August 2, 1972
IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHELLE OLIVER, et al, ***Plaintiffs,*** **vs.** **KALAMAZOO BOARD OF EDUCATION, et al,** ***Defendants.***	**Certificate of Good Faith** **File No. K88 - 71**

STATE OF MICHIGAN)
) ss.
COUNTY OF KALAMAZOO)

Arthur Staton, Jr. certifies that he is:

1. Of counsel of record for Kalamazoo Board of Education in this cause;

2. That as such he is familiar with the Affidavit of the Kalamazoo Board of Education made and filed on its behalf by its President, Allan P. Tyler, to attain the recusal of the Honorable Noel P. Fox under Title 28, Section 144 USCA;

3. That he is familiar with the contents of said Affidavit and the reasons it is made and filed in this cause and states that said Affidavit and the Motion for Recusal of the Honorable Noel P. Fox filed in this cause is and was made in good faith so as to attain the proper purposes set forth in said Title 28, Section 144 USCA;

4. That this certificate is made to accompany said Affidavit and Motion for Recusal and is made to fulfil the express requirements of Title 28, Section 144 USCA.

/s/ ARTHUR STATON, JR.
Arthur Staton, Jr.
Attorney for
Kalamazoo Board of Education

Dated: August 1, 1972

Filed August 2, 1972
IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHELLE OLIVER, et al, *Plaintiffs,* vs. KALAMAZOO BOARD OF EDUCATION, et al, *Defendants.*	No. K 88-71 Affidavit of Kalamazoo Board of Education

STATE OF MICHIGAN)
) ss.
County of Kalamazoo)

The Kalamazoo Board of Education, by Allan P. Tyler, its President, deposes and says:

1. That it is one of the Defendants in the above entitled action.

2. That Allan P. Tyler is its duly elected President.

3. That Allan P. Tyler makes this affidavit on behalf of the Kalamazoo Board of Education with its express authority and its express direction.

4. That this affidavit is made and filed to obtain the discharge of the Honorable Noel P. Fox under Title 28, U. S. C. A., Section 144, and in support of the motion made and filed by the Kalamazoo Board of Education for such purpose.

5. That the Honorable Noel P. Fox is United States District Judge before whom this matter is now pending.

6. That the Honorable Noel P. Fox has a personal bias and prejudice against the Kalamazoo Board of Education and in favor of the Plaintiffs and the class they represent within the meaning of those terms as set forth in Title 28, U. S. C. A., Section 144.

7. That both the facts and the reasons for the belief of the Kalamazoo Board of Education that said personal bias and pre-

judice does exist are more fully and specifically set forth hereafter.

That because of the length of this affidavit and because this affidavit must contain not only foundationing facts but also this affiant's reasons for believing the Honorable Noel P. Fox to be personally biased and prejudiced against the Kalamazoo Board of Education in favor of the Plaintiffs, your affiant states on information and belief that both facts and reasons can be most readily read, analyzed and understood if separately identified and considered; that accordingly the major and separate parts of this affidavit are separately treated under separate identifying topical headings; that for the further convenience of all who shall have need to read and consider this affidavit, an outline of all that follows with topical headings and appropriate page identifications is set forth below.

7. **FACTS AND REASONS:**

A. PREJUDGMENT OF MAJOR ISSUES.

(1) Dejure - de facto, and
(2) Equality of educational opportunity.

B. PERSONAL BIAS AND PREJUDICE FOR BLACK PLAINTIFFS IN ORDERING DRASTIC AND IMMEDIATE RELIEF PREJUDICIAL AND HARMFUL TO LARGE NUMBERS OF POOR WHITES IN EQUAL EDUCATIONAL CONDITION.

C. PERSONAL BIAS FOR PLAINTIFFS AND AGAINST THE KALAMAZOO BOARD OF EDUCATION AS EXHIBITED IN DIFFERENCE IN ATTITUDE AND TREATMENT OF PARTIES, COUNSEL AND WITNESSES IDENTIFIED RESPECTIVELY WITH EACH PARTY'S CAUSE.

C-1. PERSONS PREPARING AND ADOPTING PLAN.

C-2. DR. COCHRAN – EMPLOYEE QUALITIES AND TERMINATION CAUSE.

C-3. BOARD ATTORNEY FORD – IRRELEVANT

AND ERRONEOUS FINDING AS TO ADVICE REQUESTED AND GIVEN.

C-4. PROTECTIVE ORDER AND ETHICAL QUESTION – LUFF-THOMPSON DEPOSITIONS.

C-5. DELAY – TRIAL ON MERITS.

That the underlined portions of all material quoted in this affidavit are supplied by this affiant for purposes of emphasis and are not a part of the quoted material.

A. PREJUDGMENT OF MAJOR ISSUES.

(1) De jure - de facto, and
(2) Equality of educational opportunity.

The Honorable Noel P. Fox held at the inception of this lawsuit and now holds an unshakable conviction there is no difference or distinction of substance between the purposeful and intentional segregation of schools on the basis of race by a state or its agencies (de jure segregation) and the unintended, unplanned and unwanted racial imbalance which occurs without the action of the state or its agencies (defacto segregation); that the Honorable Noel P. Fox did hold such a conviction is based upon statements made by him at the hearing on Plaintiffs' application for temporary restraining order held the day or day after Plaintiffs' complaint, attached exhibits and application for temporary restraining order were filed. Pages 26 through 29 of the transcript of said hearing are now quoted verbatim, are incorporated herein, and are made part of this affidavit.

"MR. JONES. * * * Now, I must say this comes on top of a whole series of other plans and considerations that had been undertaken by the Board for the past three years, and I think what must be borne in mind here is that Holmes dictates and teaches us that when you find segregation in a school system, when you have racially identifiable schools, then you must move, and move promptly to correct the situation.

THE COURT: There isn't any question about that, and

——

MR. KRIEKARD: Well, I think there is, your Honor. Under the Charlotte, North Carolina case, the Supreme Court has said if that segregation occurred through de facto – resulted from de facto segregation –

THE COURT: Well, there isn't any question about it moving and moving fast to determine what the situation is.

MR. KRIEKARD: But – I misunderstood you. I thought you said there is no question where there is identifiable segregation it must be corrected promptly –

THE COURT: No. It must move fast. There isn't any question about it that it must move and move fast.

MR. KRIEKARD: Where there is –

THE COURT: Yes, where there is racially identifiable schools, the obligation is upon those in authority to move and move expeditiously in the determination of what the situation is and what the remedy should be.

Now, that is a mandate that has been – Brown gave that mandate.

MR. KRIEKARD: Only in de jure segregation, not in de facto segregation. They didn't in the Charlotte, North Carolina case. It spoke specifically to that question, and Chief Justice Burger said where there is no de jure segregation, the neighborhood schools are probably the best schools to maintain. That is a unanimous decision, the most recent speaking of the Supreme Court on that question.

"So I can't conceive where there is identifiable segregation per se there must be action. I don't think that is the law of the land.

THE COURT: I didn't say identifiable segregation. I said identifiable racial schools, racially identifiable schools.

MR. KRIEKARD: I can't concede that is the law.

THE COURT: That there is a duty to move and move fast, and that duty is, Number One, to determine the nature

of the racial characteristic; Number Two, what remedies, if any, are needed. And there isn't any question about speed. Speed, deliberate speed are the words the United States Supreme Court used, and Lord, we are ten, twelve years away from that decision.

MR. KRIEKARD: But where it is determined that with deliberate speed – you determine you have only de facto desegregation, then the Supreme Court has said nothing need necessarily be done. You may do things but you don't need to necessarily –

THE COURT: Now we are getting into semantics, which I am not prepared to talk on.

Well, the point is that the Court must presume that the Board that was in authority during the consideration of plans, they considered what the law and acted accordingly.

MR. KRIEKARD: I don't think you will find anything in the Resolution that they were acting because they felt they had to desegregate. They thought it was something that was better for the community, not because something in the law mandates. I don't think you will find anything in the pleadings that indicates that.

THE COURT: Well, no. You are engaging in semantics now. You are not negating in substance. Semantics, it is a different thing.

I have said what I have said, namely, that there has been on the books a long time a mandate and an obligation upon persons who are in authority to act, whether it is north or south. The mandate was there from the very beginning of the Brown case, and the obligation to act has been there ever since, to act in the situation and do what the situation requires."

This unshakable conviction in the mind of Honorable Noel P. Fox arose of necessity from sources unrelated to this proceeding, or any evidence produced therein, because it existed at the inception of the proceeding and there was and could not have been anything

in this proceeding from which such a conviction could arise; that as one who holds such a conviction, the Honorable Noel P. Fox sees and appraises the Kalamazoo Board of Education no differently in substance than the Topeka Board of Education in *Brown* nor the board of education in any other southern state where black and white schools were created by law and where black children were by law denied access to white schools; that as one who held such a conviction the Honorable Noel P. Fox saw and appraised, without any proof whatsoever in this proceeding or otherwise, the Kalamazoo School District as a district having racially segregated schools in 1954 and as a Board that had at that moment and thereafter the clear duty and mandate to remedy and desegregate its schools immediately and with all deliberate speed, and as a Board that had in the face of such a duty and until May 7, 1971, some 17 years later, done nothing in discharge of such duty. That the Honorable Noel P. Fox did so see and appraise the Kalamazoo Board of Education, your affiant cites statements made by the Honorable Noel P. Fox as same appear in Pages 26 through 29 of the transcript of the hearing on application for temporary restraining order hereinabove quoted verbatim.

That as one who holds such a conviction, the Honorable Noel P. Fox sees and appraises the Kalamazoo Board of Education as a Board that has deprived Negro children of quality education for 17 years after it was told by *Brown* to do otherwise and to do so with all deliberate speed. As one who holds such a conviction, the Honorable Noel P. Fox sees the Plaintiffs and the class they represent as innocent young children who have during these 17 years received permanent, devastating and irreparable harm caused directly by the Kalamazoo Board of Education. That the Honorable Noel P. Fox, as one who holds such a conviction, does so see and appraise the Kalamazoo Board of Education and does so see and appraise the black Plaintiffs in this action, this affiant cites the language of the Honorable Noel P. Fox as same appears in his opinion rendered at the close of the hearing on Plaintiffs' motion for preliminary injunction at Page 5, which we quote as follows:

> "The schools maintained and operated by the Kalamazoo Board of Education are racially segregated. There appears no dispute as to the fact that five elementary schools –

> Lincoln, Woodward, Edison, Roosevelt, and Northglade – are predominantly populated by black students, although the population of the Kalamazoo School District as a whole is merely approximately 23 percent black. The remaining twenty-four schools are predominantly 'white' schools.
>
> Thus we begin this decision confronted with the undisputed fact that Negroe black children are being deprived of quality education in the Kalamazoo School System, and that early deprivation of innocent young children culminates in permanent, devastating, irreparable harm – harm incapable of subsequent correction. This is best described by the *Brown* vs. *Board of Education* opinion of the United States Supreme Court, *347 U. S.* commencing on *page 492:*"

and at Page 9, which we quote as follows:

> "I am speaking now simply as to the effect on the child. I am not engaging in legal terminology. I am not making a precise, lawyer-legalistic distinction. I am categorically saying that whether the segregation is de facto or de jure, the impact on each and every individual black child so situated is the same; and this is seventeen years after *Brown*."

This affiant states that neither it nor any agency of this State created by law a system of white and black schools; that it did not nor did any agency of this State deny Plaintiffs nor any person, black or white, equal access to any school within its system. Your affiant states as a fact, insofar as it knows such fact, and on information and belief insofar as it does not, that any racial imbalance that ever existed in the schools of its system was neither planned, desired nor caused by it nor by any agency of the State; *that in any event, whether such existing racial imbalance was de jure or whether it was de facto, it is a central controlling factual issue in this case*; that this factual issue should be determined only after all competent evidence has been produced only by a fair and impartial judge free of all preconceived personal bias, prejudice and conviction for or against any party; your affiant states, based upon the facts heretofore stated in this affidavit, the Honorable Noel P. Fox has, without benefit of evidence and based solely upon his preconceived extrajudicial convictions, completely and irrevocably prejudged this central factual issue and now holds the hostility,

bias and prejudice against the Kalamazoo Board of Education and the sympathies for the Plaintiffs as could exist only had such prejudgments been made.

Your affiant states it did not nor has it ever provided Plaintiffs education of unequal quality or with unequal educational opportunity; *that in any event your affiant states should any existing racial imbalance be purely de facto, whether or not it has or has not provided Plaintiffs education of equal quality and equal educational opportunities, becomes, in itself, a major central factual issue.* Your affiant states, based upon the facts already stated in this affidavit, and upon information and belief, that the Honorable Noel P. Fox has already, without benefit of evidence, completely prejudged and determined this major factual issue; that this prejudged determination is adverse to the Kalamazoo Board of Education and that the Honorable Noel P. Fox attaches to the Kalamazoo Board of Education hostility and bias and prejudice, and attaches to Plaintiffs sympathy which could exist only if and when such factual issue had been so prejudged and adversely determined against the Kalamazoo Board of Education.

B. PERSONAL BIAS AND PREJUDICE FOR BLACK PLAINTIFFS IN ORDERING DRASTIC AND IMMEDIATE RELIEF PREJUDICIAL AND HARMFUL TO LARGE NUMBERS OF POOR WHITES IN EQUAL EDUCATIONAL CONDITION.

The personal bias and prejudice the Honorable Noel P. Fox holds in favor of Plaintiffs, and particularly black Plaintiffs, is exhibited in the contrast of his awareness and treatment of their rights and interests, and in his awareness and treatment of the rights and interests of poor white persons, where undisputed evidence clearly considered by him establishes their economic and educational condition and circumstances are substantially the same. Specifically, the Kalamazoo Board of Education in November of 1968 appointed a Citizen's Racial Balance Committee chaired by Donald C. Smith to study and make recommendations on the subject of student body mix or integration. Though this committee was specifically charged to work out a program to achieve student body mix not only racially but *economically*, among others, and though the testimony of Donald C. Smith, its Chairman, so indi-

cated, the Honorable Noel P. Fox found this Committee's charge was to study and make recommendations with reference *solely* to *racial* integration. That the charge of this committee was to work out a program to achieve not only a racially mixed student body, but also an *economic* and *socially* mixed student body is established in the opening paragraph of the report of the Committee dated August 18, 1969 attached as Exhibit "G" to Plaintiffs' complaint and specifically referred to by the Honorable Noel P. Fox in the Opinion containing his findings on Plaintiffs' motion for preliminary injunction. The exact language concerning the Committee's charge appears at Page 1 of this report and exhibit and is as stated in the quote that follows:

> "On November 6, 1968 the Citizens Racial Balance Committee was charged by the Board of Education to work out a program to achieve a *mixed* student body in our classrooms. We were asked to find a way to bring together students of various *economic*, *racial* and *social* backgrounds and educational aspirations."

That the testimony of the Committee's Chairman, Donald C. Smith, given at the hearing on Plaintiffs' motion for preliminary injunction, did establish that the Committee was charged to see that all schools in the community and every classroom within each school would be balanced not only *racially* but *socioeconomically*, appears from the transcript of his testimony as same appears at Page 47, the exact language of which is as appears in the quote that follows:

> "Q. (By Mr. Jones, continuing) What was the purpose and what were the objectives of this particular committee as pointed out to you and as the committee itself saw it?
>
> A. A charge was given us by the Board of Education to develop, first, the feasibility of attaining racial balance in the Kalamazoo Schools and implementing a plan therefor, *and to see that all schools in the community would be, and every classroom within the school would be balanced racially and socioeconomically.*"

That the Honorable Noel P. Fox did find, in spite of this clear and undisputed evidence, the charge to the Committee was to study

only the problem of racial segregation and make recommendations thereto, appears at Pages 12 and 13 of his Opinion on Plaintiffs' motion for preliminary injunction. The exact language as it there appears is as set forth in the quote that follows:

> "On November 6, 1968, another committee was charged by the Kalamazoo Board of Education to study the problem of *racial* segregation in the schools and to make recommendations regarding a suitable integration plan."

The Citizens' Racial Balance Committee found serious academic underachievement in some 9 or 10 elementary schools within the Kalamazoo School District, each of which had economically deprived student bodies. These schools included the 5 having most of the system's black students, and an additional 4 or 5, all or some of which had student bodies all or predominantly white. All were substantially equal in their underachievement. The Honorable Noel P. Fox of necessity read and clearly relief upon the report (Exhibit G) of the Citizens' Racial Balance Committee where these findings are stated. Though the Committee's findings clearly indicated without dispute the system contained substantially as many poor and underachieving whites as it did blacks, the Honorable Noel P. Fox found from this clear and undisputed language, *as to the blacks,* a *stark inequitable condition of educational deprivation,* but saw and *ignored* what could only have been an *identical condition for the poor whites.* That the Committee did find substantially equal underachievement as to both poor whites and blacks, this affiant cites the exact language of the Committee as contained in its report at Pages 3 and 4 (Exhibit G), the exact language of which is as appears in the quote that follows:

> "These figures illustrate the serious extent to which racial segregation exists in the Kalamazoo school district. Racial isolation has had a serious effect on the achievement of the students thus isolated; the predominantly black attended schools achieve at a level two grades below national norms in grade six. Compared to the top achieving schools in our city, they are four grades below.
>
> *The committee discovered, however, that racial isolation alone does not account for poor achievement. Equally significant is economic isolation.*

We received statistics from several sources which helped us to pinpoint those schools whose student bodies came from low income families. These statistics covered children of welfare recipients, ADC mothers, and foster homes, plus family income figures derived from a study prepared for the Kalamazoo Metropolitan Planning Commission in 1966.

Thus, we could add to the five schools which have most of the black students another four or five schools with economically deprived students. Some of the latter schools are all white; *all of them are achieving at a level as low as the predominantly black schools. It became apparent to us that student achievement varies in direct proportion to economic means, and we agree that something must be done about this situation also."*

That the Honorable Noel P. Fox *did* read the precise language of this report, *did* see the educational condition of the poor blacks, and *did* describe it as a stark inequitable condition of educational deprivation, and did see and did choose to totally ignore a substantially identical condition on the part of poor whites, described in the same exhibit on the same page and in the same context, is established, without possible dispute, in the language of the Honorable Noel P. Fox as same appears at Page 14 of his Opinion on Plaintiffs' motion for preliminary injunction, which is exactly as set forth in the quote that follows:

"On August 18, 1969, the Citizen's Racial Balance Committee tendered its findings and recommendations to the Board. The Committee found that over 90 percent of all black elementary students were housed in the five elementary schools located on the north side of town and that 95.5 percent of all black junior high students attended three of the five junior high schools.

The Committee report further stated:

'These figures illustrate the serious extent to which racial segregation exists in the Kalamazoo school district. Racial isolation has had a serious effect on the achievement of the students thus isolated; the predominently black attended schools achieve at a level two grades below national norms in

grade six. Compared to the top achieving schools in our city, they are four grades below.'

Identifying both moral and legal grounds for moving quickly to correct this stark inequitable condition of educational deprivation, and respecting, too, the need to move reasonably and thoroughly, the Citizen's Committee recommended a three-phase program for implementing improved educational opportunity and quality through racial integration."

Throughout Exhibit "G" the committee's equal concern with economically deprived and underachieving children, whether black or white, repeatedly appears. When the Committee made its recommendations concerning integration, it expressly directed its recommendations toward the achieving of racial *and* economic balance. When the Honorable Noel P. Fox described the recommendations of this committee, he found their recommendations to apply *only* to *racial* integration, deliberately ignoring its recommendations as applicable to the poor whites. That the Committee's recommendations *did* apply to *both racial* and *economic* balance, this affiant cites the exact language of the applicable portion of the committee's recommendation as it appears at Page 8 of its report, which is exactly as stated in the quote that follows:

"1. A full integration program will begin in all elementary schools and individual classrooms. This will achieve *racial and economic* balance in each of 5 enlarged elementary school districts, based on revised junior high attendance areas. Thus, the neighborhood school concept will be maintained but the neighborhoods will encompass larger areas. Certain elementary schools would house grades K-1-2-3, and others would house grades K-4-5-6."

That the Honorable Noel P. Fox *did* in his findings with respect to the recommendations of this Committee, deliberately ignore the Committee's recommendations with reference to economic balance, is based upon the exact language of the Honorable Noel P. Fox as same appears on Page 14 of his Opinion on Plaintiffs' motion for preliminary injunction, which is as is set forth in the quote that follows:

> "Identifying both moral and legal grounds for moving quickly to correct this stark inequitable condition of educational deprivation, and respecting, too, the need to move reasonably and thoroughly, the Citizen's Committee recommended a three-phase program for implementing improved educational opportunity and quality *through racial integration.*"

That the Honorable Noel P. Fox in his order for preliminary injunction ordered the Kalamazoo Board of Education to implement immediately the May 7th Plan; that the Honorable Noel P. Fox knew this to be a plan for racial balance only and of necessity knew it to be a plan solely calculated to place a balanced percentage of black children in all schools, poor or rich, and of necessity specifically including the low achieving and economically disadvantaged all or nearly all white schools. The measure of the Honorable Noel P. Fox awareness of, his sympathy and concern for, and his deep personal bias and prejudice in favor of the black Plaintiffs, is demonstrated by the nature of the May 7th Plan, the ramifications of its implementation, and the circumstances under which it was adopted; that the May 7th racial balance plan was conceived in haste, without time for thought to alternatives; it was in all essential details prepared in approximately 30 days; it was considered and adopted in approximately 4 days; it revolutionized attendance patterns as to affect every school child and his parents within the system; it split a community, leaving it in division and turmoil, and it was a plan, by the very nature of which was and could only be of educational disadvantage to economically deprived poor white children by adding to the already economically isolated, deprived and disadvantaged student bodies in the poor white schools, additional numbers of equally economically and educationally disadvantaged black children; that the Honorable Noel P. Fox knew the effect such additions would have on the educationally deprived poor white children in the poor white schools. Your affiant states on information and belief, because he read and relied upon the findings and report of the Citizens' Racial Balance Committee (Exhibit G), and this report cited educational authorities and studies showing a clear relationship between economic disadvantage and educational achievement; that Page 2 of Appendix B attached to and made part of this report exactly states, insofar as is here applicable, the following:

"It also has been shown that much of the gain sometimes associated with racial desegregation is really due to the effects of placing low-income youngsters in a higher social-status school or classroom."

"The equal opportunity study conducted to fulfill the requirements of the Civil Rights Act of 1961 resulted in profound evidence. The study revealed that placing youngsters from low-income families in classrooms composed primarily of middle-class youngsters helps to raise achievement levels among the former without detracting from the achievement of the latter."

That on Page 3 the report cites a study conducted by Dr. Pettigrew of Harvard indicating that the study concluded among its findings the following, stated exactly as it appears in the quote that follows:

"Disadvantaged students need to be in school with advantaged children, and vice versa, if schools are to do the job society expects them to do."

On the basis of the foregoing facts, your affiant states as fact the Honorable Noel P. Fox knew when he rendered his preliminary injunctive order, that there were within the Kalamazoo School District as many or nearly as many poor white children in the same or nearly the same educational circumstances as poor black children; that he knew the Board of Education and its committees, when, in their integration efforts, as concerned with the condition of poor white students as they were for poor black students; that he knew from the studies made by the Kalamazoo Board of Education and its committees, economic considerations were absolutely essential in any integration plan seeking to improve the educational interests of children, black or white; that he knew the May 7th Plan as proposed was, in its details, hastily prepared, hastily adopted and very disruptive and devisive in the community; that he knew this plan was a plan directed solely at racial balance; that he knew this plan if and when implemented would add to the already economically and educationally deprived white schools additional numbers of equally economically and educationally deprived black students; that he knew the educational condition of all students in the poor white schools where such additions were made was not helped but harmed; that he felt

compelled, without allowing any time for further study, to order the implementation of the May 7th Plan, notwithstanding the harm to poor white children and the disruption to the community generally; that as a Judge whose responsibilities are to all citizens, black and white, the Honorable Noel P. Fox could not thus act to serve the interests of the poor blacks and disserve the interests of the poor whites without such overwhelming personal bias and prejudice in favor of black Plaintiffs as would render it impossible for him to determine the issues in this litigation where the constitutional and educational interests of all students are so directly concerned. That with such an overwhelming personal bias and prejudice in favor of black Plaintiffs, the Honorable Noel P. Fox has not and can never fairly and objectively appraise the Kalamazoo Board of Education and the actions which it has taken and must take as a body committed to serve the educational interests of all of its students, whether black or white.

C. PERSONAL BIAS FOR PLAINTIFFS AND AGAINST THE KALAMAZOO BOARD OF EDUCATION AS EXHIBITED IN DIFFERENCE IN ATTITUDE AND TREATMENT OF PARTIES, COUNSEL AND WITNESSES IDENTIFIED RESPECTIVELY WITH EACH PARTY'S CAUSE.

C-1. PERSONS PREPARING AND ADOPTING PLAN.

The Honorable Noel P. Fox described those who prepared and adopted the May 7th Plan on Pages 18 and 19 of his Opinion on Plaintiffs' motion for preliminary injunction in language as appears exactly in the quote that follows:

> "This court finds, as a matter of fact and law, that it was not precipitous, that it was a very careful, deliberate, fully-considered plan by conscientious, sincere, publicly dedicated, self-sacrificing men who had the courage to 'bite the bullet' ".

That your affiant states the character qualities of all such persons was and is not an issue in this case; that there was not at the time said statement was made nor had there been proof nor showing as to the character qualities of such persons, and that a finding as to the character qualities of such persons was unnecessary, extra-

judicial and indicative of the personal bias and prejudice the Honorable Noel P. Fox holds in favor of Plaintiffs and all persons who are proponents of the May 7th Plan.

C-2. DR. COCHRAN – EMPLOYEE QUALITIES AND TERMINATION CAUSE.

That Dr. Cochran was Superintendent of Kalamazoo Schools in the period before and immediately after the adoption of the May 7th Plan. He was terminated by the Kalamazoo Board of Education in July of 1971. The Honorable Noel P. Fox made two specific findings with reference to Dr. Cochran, i. e., that he was a dedicated public servant and that he was pressured into resigning his position by the Kalamazoo Board of Education because of his part in preparing and attempting to execute the May 7th Plan; that the finding of the Honorable Noel P. Fox with reference to Dr. Cochran's dedication was totally without basis in the record and is derived solely from his part in the preparation and implementation of the Plan; that this finding being thus extrajudicial, except as indicated, exhibits the personal bias and prejudice the Honorable Noel P. Fox holds, not only for Plaintiffs, but all persons partaking in the May 7th Plan, and the position they assert in this litigation; that Dr. Cochran's termination and the reasons for his termination were not an issue in this litigation, were not questions upon which proofs were received, and are totally without basis in the record save for one question and one answer received over objection in which Dr. Cochran alone stated in *his* judgment his termination was directly related to his part in the May 7th desegregation plan; that the actions of the Honorable Noel P. Fox in receiving the irrelevant and conclusionary testimony on a matter not in issue and his finding Dr. Cochran's termination was so caused, exhibits the personal bias and prejudice the Honorable Noel P. Fox holds in favor of Plaintiffs and his sympathy for Dr. Cochran as one who had a part in preparing the plan which Plaintiffs seek implemented; that it further indicates the personal bias and prejudice of the Honorable Noel P. Fox against the Kalamazoo Board of Education in that it demonstrates his desire, beyond the scope of any evidence or issue in this litigation, to find and appraise it as an employer who has arbitrarily discharged a loyal and dedicated public servant solely because he performed his constitutional duties.

C-3. BOARD ATTORNEY FORD – IRRELEVANT AND ERRONEOUS FINDING AS TO ADVICE REQUESTED AND GIVEN.

On Page 28 of his Opinion on Plaintiffs' motion for preliminary injunction, the Honorable Noel P. Fox recorded a specific finding of fact and law concerning incorrect advice the Board's attorney, Mr. Ford, had given it; that the exact language of this finding is as set forth in the quote that follows:

> "And I find as a matter of fact and law the opinion of Attorney Ford, when asked by the School Board whether it would be proper for it to seek guarantees from a builder that its project not enhance or add to racial segregation, was incorrect in his advice that the Board had no authority to act and that the Kalamazoo Board could disregard the State School Board's mandate. This is not the law."

In making this finding of fact and law with respect to the Kalamazoo Board of Education, its attorney, Mr. Ford, and the advice he had given it, the Honorable Noel P. Fox found that the Board had asked Mr. Ford whether it would be proper for it to seek guarantees from a builder that its project not enhance or add to racial segregation; that your affiant states in fact that no such question was ever asked of Mr. Ford; that in making this finding of fact and law, the Honorable Noel P. Fox found that Mr. Ford had incorrectly advised the Kalamazoo Board of Education it had no authority to act and that it could disregard the State School Board's mandate; that this affiant states the advice the Honorable Noel P. Fox found Mr. Ford to have given was neither requested nor given; your affiant states that the State School Board had never mandated the Kalamazoo Board to seek guarantees from a builder that a housing project would not enhance or add to racial segregation, and that Mr. Ford neither was asked nor did give advice to the Kalamazoo Board of Education as to whether it could or should disregard such a state School Board mandate. This affiant further states that the Director of the Civil Rights Commission, in a letter dated July 25, 1968, to the President of the Kalamazoo Board of Education, asked for a firm guarantee that the Kalamazoo Public School System would develop and implement a plan for pupil assignment which would prevent any further racial imbalance in

the schools regardless of the racial composition of the tenant population in the housing development planned for the City of Kalamazoo at the corner of Woodward Avenue and Paterson Street; that Mr. Ford was asked to give an opinion concerning the authority of the Civil Rights Commission to make such a demand and that Mr. Ford did give an opinion that the Board of Education was not legally required to give the guarantees requested by the Commission; that the precise advice requested and advice given was set forth in an exhibit admitted without objection at the hearing on Plaintiffs' motion for preliminary injunction and that the portion of that exhibit pertaining to the advice asked and opinion given as set forth in said exhibit is exactly as stated in the quote that follows:

"MEMORANDUM ON AUTHORITY OF THE CIVIL RIGHTS COMMISSION OF MICHIGAN IN FIELD OF EDUCATION

In a letter dated July 25, 1968 from the Executive Director of the Civil Rights Commission to the President of Kalamazoo Board of Education, the Commission asked for a firm guarantee that Kalamazoo Public School System would develop and implement a plan for pupil assignment which would prevent any further racial imbalance in the schools, regardless of the racial composition of the tenant population in the housing development planned for the City of Kalamazoo at the corner of Woodward Avenue and Paterson Street. I have been asked to give an opinion on the authority of the Civil Rights Commission to make such a demand.

* * *

* * * It is my opinion that the Board of Education is not legally required to give the guarantee requested by the Commission."

That the findings of the Honorable Noel P. Fox concerning advice asked of Mr. Ford, the advice given by Mr. Ford and the mistake as to law and fact made by Mr. Ford, all had of necessity to be derived from sources outside of the four corners of this lawsuit, are unrelated to any issue in this lawsuit, and exhibit a need and

desire on the part of the Honorable Noel P. Fox to find fault and error on the part of the Kalamazoo Board of Education and upon the part of its attorneys; that this need and desire on the part of the Honorable Noel P. Fox stems from and arises of necessity from sources unrelated to this lawsuit or anything that has transpired therein; that it evidences a form of personal bias and hostility not only against the Kalamazoo Board of Education, but all those identified with it and its interests in the pending litigation.

C-4. PROTECTIVE ORDER AND ETHICAL QUESTION – LUFF-THOMPSON DEPOSITIONS.

Board member Edward P. Thompson and former Board member Dr. Andrew C. Luff are key and pivotal witnesses to all matters in issue in this litigation. Their interests are totally opposite to the Kalamazoo Board of Education and are totally identified with Plaintiffs. That specifically, Edward P. Thompson has been a Board member for the Kalamazoo Board of Education since 1965 and now is a member; Dr. Andrew C. Luff has been a Board member of the Kalamazoo Board of Education since 1968 and has continuously served in such capacity until July 1, 1972; Edward P. Thompson has been an officer of the Kalamazoo Board of Education and served two terms as its President; Dr. Andrew C. Luff has been a past Treasurer and Vice President for the Kalamazoo Board of Education. That both Dr. Luff and Mr. Thompson either made or supported the motions calling for the prompt desegregation of all schools on April 5, 1971, and the motion adopting the plan for desegregation of all schools on May 7, 1971, hereinabove and hereafter called the May 7th Plan. That on July 6, 1971, at a regular meeting of the Kalamazoo Board of Education, the Kalamazoo Board of Education adopted a resolution which did, among other things, postpone the implementation of the May 7th racial balance plan for further study by the Board for a period of one year, with directions to the administration to submit to the Board, within a reasonable period, alternative types of plans for improving both racial and socioeconomic balance in the schools; that said resolution was opposed by Board members Luff and Thompson, prior Board members Schma and Thomas having not run for reelection and having been replaced by Board members

Hoekstra and Pattison. That subsequently Edward P. Thompson submitted to the Board and to the press a statement concerning the action of the Board taken on July 6th; that in the opening paragraph of this statement Edward P. Thompson stated schools of the City of Kalamazoo had for decades had compulsory segregation; that the language of said statement, insofar as is here applicable, appears exactly as stated in the quote that follows:

> "This Board, over Dr. Luff's and my opposition, scrapped a plan which would have required integration in the elementary grades and has substituted a so-called 'open enrollment plan' or 'voluntary integration'. I fear that these names are misleading in that the plan leaves our schools in the grip of habits and fears built up by decades of compulsory segregation in the schools of this city."

Subsequently in said statement Edward P. Thompson describes the right of black and white parents to a neighborhood school in the exact language stated in the quote that follows:

> "It is said that voluntary integration permits us to solve the problem while retaining the neighborhood school. Nonsense. The neighborhood school is itself a problem. The so-called 'right' of a parent to select the school for his child has been a right reserved to white parents only, and has not been extended to black parents. After decades during which black people were compulsorily deprived of their right to neighborhood schools, the neighborhood school has now quite suddenly been raised to a sanctity it never before enjoyed."

That Dr. Andrew C. Luff testified as a witness on behalf of Plaintiffs at the hearing on Plaintiffs' motion for preliminary injunction. That as a part of pre-trial discovery, the Kalamazoo Board of Education, through its counsel, the Ford firm, noticed the pre-trial discovery depositions of Dr. Luff and Mr. Thompson for April 7, 1972; that before any depositions were taken in this lawsuit, Mr. Enslen, one of Plaintiffs' counsel, in a letter dated March 9, 1972, to Board attorney, Mr. Staton, seriously questioned the Board's right to take the Luff and Thompson depositions, though he admitted Plaintiffs expected to call them, along with other Board members, at trial; that the exact language of said letter insofar as is here applicable, is as stated in the quote that follows:

"5. I am *very* confused about your depositions of Messrs. Thompson and Luff. They are party defendants and it is my understanding that you are representing them as well as the school board. Since they are not parties to the lawsuit, they, of course, need not be subpoened. But, what do you claim they are? They are not adverse parties. If anyone should be taking their depositions, it would appear to be the plaintiff, however, since plaintiff will call them and other school board members at the trial, it would seem unnecessary to take their depositions unless you are doing it to preserve their testimony. You may recall that this subject came up during our last pre-trial and Judge Fox indicated they could not be cross-examined by you because they are not adverse parties. I seriously question whether there is any purpose under the Federal Rules for taking their depositions."

That on April 3, 1972, Dr. Luff wrote a letter to Mr. Staton, Board attorney, concerning the notice he received for the taking of his deposition, and submitted a copy thereof to the Honorable Noel P. Fox; that the central essence of said letter was to indicate that he was troubled for essentially four reasons as follows:

1. That the Ford firm had represented the Kalamazoo Board of Education and member Mr. Henry Ford was present and had been privileged to information Dr. Luff had been, and had guided Dr. Luff from a legal point of view in his decisions;

2. Dr. Luff was troubled by the formality and legalistic tone of the letter accompanying the notices;

3. The deposition was not scheduled on a Saturday morning or in the evening, and would require Dr. Luff to lose a substantial amount of money;

4. He wondered why he as a member of the Board of Education and a named defendant in the suit would be deposed by Mr. Staton;

that in the course of this letter Dr. Luff evidenced his realization the Board, not he, was the client of the Ford firm, and the exact language in said letter insofar as is here applicable is precisely as stated in the quote that follows:

"I know that I, personally, am not your client but I am a member of the Kalamazoo Board of Education which is the client."

That neither Dr. Luff nor Mr. Thompson in any other way or manner opposed the taking of the depositions then or as thereafter scheduled; that before any depositions in this cause could be taken and before any question as to the manner of questioning in depositions could arise, Plaintiffs, through their counsel, Mr. Hummer, advised the Luff and Thompson depositions could not be taken as scheduled as Plaintiffs intended to file appropriate motions to obtain a Court order preventing their taking on the grounds Defendant could not depose its own Board members; that to avoid delay, the depositions as set were cancelled and Plaintiffs prepared the protective motions desired for hearing and determination at the next scheduled pre-trial date, i.e., May 1, 1972; that Plaintiffs did timely file their motion for protective order; that the grounds for said motion are exactly as stated in the quote that follows:

"1. The examination by Defendant of prior members of the Board (Messrs. Schma and Thomas) who supported the racial balance plan ordered implemented by this Court was conducted in such a manner as unreasonably to annoy, embarrass and harass proponents of the racial balance plan and the Court should not permit further harassment of proponents of the racial balance plan.

"2. Defendant has examined two prior members of the Board of Education who supported the racial balance plan and has had the opportunity to examine the members of the Board opposed to the plan and has had, therefore, adequate discovery by deposition of proponent and opponent members of the Board.

3. The persons which Defendant Board of Education seeks to examine are members of the Defendant Board of Education."

That the relief sought in said motions was for an order either forbidding the taking of said depositions, or, in the alternative, limiting them to matters not of public record and to examination by direct but not by cross-examination; that on May 1, 1972, as a

part of the pre-trial hearing, the Court heard the argument of Mr. Hummer on behalf of Plaintiffs in support of its motion for protective order; that though Plaintiffs' counsel, Mr. Enslen, at the close of this agrument stated he was sure Mr. Staton wanted to respond, the Court, without giving Mr. Staton, attorney for the Kalamazoo Board of Education, an opportunity to do so, proceeded to decide the motion, and a colloquy then occurred between the Honorable Noel P. Fox and Mr. Staton in words exactly as they appear in the quote that follows:

> "THE COURT: Well, perhaps I should sit in on the depositions. I don't think that you should cross-examine them, because they are your witnesses. They are the school board.
>
> MR. STATON: I want to file this, your Honor, before you decide it; and I would also like to be heard on the matter, because I consider the matter – unless you wish to decide it without –
>
> THE COURT: No. Go ahead. But my first impression is that they are school board members and you represented both school boards."

That the Honorable Noel P. Fox interrupted the responsive argument on Plaintiffs' protective motion made by Mr. Staton and raised for the first time the Ford firm's right to continue representation of the Kalamazoo Board of Education in this lawsuit. The language of the Court and the colloquy that ensued between the parties and the Court wherein this question by the Court was raised and thereafter discussed, is set forth in Pages 142 through 158 of the transcript of the May 1, 1972 pretrial, the exact language of which is as set forth in the quote that follows:

> "THE COURT: This is what kind of bothers me, how your firm can continue to represent the school board when the school board drafted and participated in the activities for preparing the plan that is now in question, and now you are representing the school board that is questioning the plan that was worked out when your firm was their lawyer.
>
> MR. STATON: Well, why can't we do that? Isn't a lawyer entitled to represent this board? We represented this board as changes have taken place down through the years. I know of no reason why that would foreclose this law firm

from the representation of this client in whatever kind of cause they need representation.

THE COURT: Well, I presume that as a lawyer or the lawyers of your firm participated in drafting the plan that is now a part of the school board system, that you advised them on this plan.

MR. STATON: I didn't represent to you–

THE COURT: Well, your law firm did, members of your law firm represented the school board when it drafted the plan that is now in force. Now you are representing the school board that is trying to kick out the plan, and you are advising them. Your firm did it.

MR. STATON: Are you saying that we can't–that is unethical?

THE COURT: It raises a question in my mind, and it raises a question in my mind why you should be cross-examining the persons that you represented as attorney.

MR. STATON: Because, your Honor, we don't have the knowledge–

THE COURT: You represented these people when they were on the Board.

MR. STATON: We represented–these gentlemen are members of this lawsuit as individuals. We represented the Board.

THE COURT: Yes, you represented the members of the Board when they were on the Board and drafted the plan that is now challenged.

MR. STATON: Do you think we know, because we represented the Board, what the intent, the thought, the understanding of each individual member of the Board was? We couldn't possibly know that, your Honor. Now what we are talking about–

THE COURT: I can't conceive how you can be in this position.

MR. STATON: What position is that, your Honor?

THE COURT: Well, you are representing two sides of the same question, and it is involving the same Board.

MR. ENSLEN: Your Honor, can't these two individuals refuse to waive the attorney-client privilege? They were represented by this law firm. Why would they have to submit to be deposed by the same law firm when the privilege belongs to those two individuals?

THE COURT: These are the kind of questions that are raised.

MR. ENSLEN: The privilege is not Mr. Staton's. It is Mr. Thompson's and Dr. Luff's privilege. They haven't waived it.

MR. STATON: There is no privilege between us as a law firm, and Dr. Luff and Ed Thompson as a witness. We don't represent them. We have no personal representation of them at all.

MR. ENSLEN: But as an entity of the State, you do, and they were entities of the State when the plan was adopted, and still are, and you represent that entity.

MR. LUCAS: They were members of the Board of Education, and as such constitute a Board of Education, and I would think under the rules, if a man died and was replaced by someone else, he would automatically be substituted as defendant, otherwise I think we are sitting here and negotiating, talking about a case with a whole bunch of fellows that don't have lawyers here, defendants who have not filed an Answer and the case is not at issue. If that answer was filed on behalf of some mystical corporate entity, then these individual defendants have yet to answer, and because of that, we should move for a default judgment. And since they constitute the majority of the Board, or all of them haven't answered, not a single individual has answered, we could just ask for a default judgment against them since they were a legal entity, and the Court's order is final, under that theory. I think it is a ridiculous theory.

MR. STATON: It is a ridiculous theory because a party was sued, and that is the Board of Education, and they appeared and are not in default, and they are contesting the litigation. We don't represent the individual members of the Board as individuals, and they are sued as individuals.

MR. LUCAS: They are sued in their respective capacities.

THE COURT: That's right.

MR. LUCAS: If the Secretary of Health, Education and Welfare is a defendant, now you sue him because he holds the office. You are not charging him with personal malfeasance because the hearing examiner refused to award benefits in the disability case. When a new secretary is appointed, he is automatically substituted. It is not a personal liability unless there is a notice when the suit is filed against him that it is a personal suit.

THE COURT: Well, it has been bothering me.

MR. LUCAS: I think the Board is here through its individuals as an entity, and whatever has been filed is really on behalf of these individuals. If they leave the case, they are not a defendant anymore. If they leave the Board, they are only a defendant as long as they are a board member.

MR. STATON: Well, there is absolutely no need if—the way you have indicated—if the board is capable of being sued, it is a legal entity; it has been sued in this case, and it is our only client. There is absolutely no point, as I understand you indicated, of naming individual members to the Board as defendants in this case.

Now I didn't do that. I don't know why you named them as defendants. I know it wasn't necessary for us as a client to do anything more than represent the Board, that is, the Board of Education.

MR. LUCAS: I am just suggesting that we are in for a great deal of delay if your theory is correct, because I think it would be appropriate for the Court to issue a show-cause

order why they should not have a default judgment entered against them for failure to answer. We need a whole bunch more lawyers in here.

MR. STATON: Each board member could appear or not appear, the named defendant, with or without a lawyer. Having not appeared, obviously they are susceptible to default. How that can be a default of the Board, a separate legal entity, is beyond me, how we could represent clients that we didn't have.

THE COURT: Well, I will give you a chance to brief the problem on both sides. These are parties named as defendants in this case and were members of the Board of Education at the time, and still are members of the Board of Education.

MR. ENSLEN: Still are, yes.

MR. STATON: The two that we propose to depose are presently members of the Board of Education.

MR. ENSLEN: They are the only two left on the Board who voted for the plan of May 7th.

THE COURT: And they are your clients.

MR. STATON: Well, we have the right to depose even if they were my clients. I have a right to depose them under the rules of discovery, and the rules are clear on that, and I can produce the authority on that.

THE COURT: But you can't cross-examine. And I should probably preside at the desposition.

MR. LUCAS: I think we should get it resolved, your Honor. If he is saying he is entitled to depose them, if they are his clients, I think we ought to get the ultimate issue resolved on whether or not these people are in fact, all of them—not just these two—are his clients; or if not, they should file Answers or have counsel.

THE COURT: Just brief the subject and I will consider whatever you have by way of the law, and I may be persuaded if there is contrary law, but—

MR. STATON: What is the subject now? Let's narrow the issues and decide who has to brief what, and what are the order of the briefs.

THE COURT: Well, there are two board members who are named as defendants, and apparently you have appeared for them.

MR. STATON: No, that is not true. We have appeared for the Board. What we have done in the way of an appearance is speak in our appearance papers, and I don't want to stipulate to something that isn't a fact. We have appeared for the Board of Education, a named defendant and an entity capable of suing and being sued, and our only clients.

THE COURT: And your only client can operate through its members only, and that constitutes the Board. The Board doesn't exist in a vacuum. It exists with Board members, and that is the entity of your client.

MR. STATON: Well, are you—is this the matter you want briefed and will rule whether this is—

THE COURT: Yes, whether you can depose them; and if you can depose them, whether you can cross-examine them, and also the issue of your former representation. You formerly were general counsel for the Board when it drafted the plan that is in issue, and how can you challenge that plan now?

MR. STATON: Now this is a matter the record should show clearly, I believe, that hasn't been raised by the parties, as far as I know. The last issue that you just raised hasn't been raised by the parties.

THE COURT: Well, it is raised from this standpoint: How can you then challenge these people who you represented as the Board? They were the Board at that time. And this goes to the proposition of how far you can go with discovery, how far you can treat these persons as adverse. What you are trying to do is treat these parties as adverse.

MR. STATON: I am trying to treat them as witnesses,

and if their position is hostile, I am asking no more than something the rules give to every lawyer, and that is the right to use such every technique that is necessary to determine the facts and the truth. The paramount issue in this lawsuit is the truth. The parties are certainly entitled to have this determined on the truth, and I don't think the annoyance of the witness–

THE COURT: I am not talking about the annoyance of witnesses. I am talking about a lawer representing a client and having represented a client and advised the client on the very subject that is in issue in the case, the plan itself.

MR. LUCAS: We think the defendant, that the board members should have a right to be advised whether or not they are represented, all of them. Not just these two. They may think they are represented here.

MR. STATON: They have been advised by letter in setting these depositions up specifically who we represent, who we do not represent, that they are parties. Plaintiffs sent their discovery Interrogatories to each one of them. Letters were given to the parties and to Mr. Enslen stating specifically that although the interrogatories were directed to the Board and to the various individuals of the Board, we represent the Board. We would file an answer on behalf of the Board to the extent that the Answers were directed to them as individuals, asked them for their answers so that they could be supplied in the Interrogatories.

If I understand the Court – Let me ask you this question so I will understand it: If they are hostile witnesses–I don't know how you define "hostile witness," but I will rely on these depositions, the questions asked and the answers given to establish hostility on the part of both of the previous ones who testified. Is it that I can't depose a hostile witness?

THE COURT: Well, what you are doing, you are deposing your own clients, and you are discovering your own clients' previous action, which you participated in as a law firm.

MR. STATON: Is there some rule that forbids that? It escapes me. The rule, as I understand it, is that you can depose your own client and discover your own client, and there is–there will be no discovery of these clients if I can't do it.

THE COURT: Dual representation on the same issue. You advised these other people–at the time your law firm advised these other people during the preparation of the plan. Now, your law firm is representing a group that wants to tear the plan apart.

"MR. STATON: Well, is it your position that we can't do this, that this law firm–

THE COURT: Well, it raises a question in my mind of the propriety of such representation, and then cross-examining or examining other people whom you represented before and advised – and you were the attorney who advised them, your law firm is the attorney who advised them; and who should know better than your law firm what their actions were and what they were?

MR. STATON: Are you saying that this would not bar any other law firm –

THE COURT: No. I am not saying that.

MR. STATON: Well, I can't let this lawsuit go to trial without full and complete discovery, and no one could in my function; and if this Court is ruling that we can't complete that discovery –

THE COURT: I am ruling that you search the law and show me your authority to do this in light of the position of your law firm, in the posture of the case, that is precisely what I am asking you to do.

MR. STATON: Well, now it is their motion, and I would think, in accordance with ordinary propriety–

THE COURT: I am asking you from this standpoint; You are seeking to have this man – these people discovered. Now, in the posture of your law firm as having advised the previous Board, now seeking to discover your own presently

composed board members, you are examining your own clients.

MR. STATON: I have authority on the right to do it. I can show it to you.

THE COURT: Well, but I mean in the position – in the posture of this case where the central issue in the case is – the object of the central issue is the produce of a Board which you, as counsel, advised during the representation.

MR. STATON: Well, what is the Court's rule? I will have to cancel the depositions tomorrow, obviously. You will order that they are canceled, I take it?

THE COURT: Right.

MR. STATON: As to their motion, are they to file the first brief, or do you want to reverse the order and have me to file the first brief?

THE COURT: File simultaneous briefs on those propositions.

MR. HUMMER: When would you like the briefs, your Honor?

THE COURT: Can you get them out in a couple of weeks or ten days?

MR. STATON: Ten days. If there is anything about the position of this law firm, now that we are directly here, that will limit us in any possible way in the full and complete representation of this client, we simply would have – by any order of the Court or any implied order, we simply–

THE COURT: This is why I want to have the briefs. I want to know. It seems to me to be at least a very peculiar situation.

MR. STATON: I want to know, as I say, at the outset. And I do not now see that it is a peculiar matter now, in due deference to the Court. If the Board was entitled to be represented, then it was represented, and I think it is entitled to be

represented in this issue.

THE COURT: There is no question about it, their entitlement to absolute representation to the fullest extent possible.

MR. STATON: There is no question in my mind that if this discovery is limited in any way, that this client can't have a fair trial in this cause, that is all there is to it.

And I want to say, up to this juncture – and I think counsel will put it on the record – there hasn't been one thing that I have done on behalf of this client that hasn't been completely utter and total disclosure without limitation of any kind.

THE COURT: There isn't any question about that; but the question is whether–

MR. ENSLEN: There is no question about that."

This affiant states as fact that on the basis of the colloquy between Court and counsel as hereinabove quoted, the Honorable Noel P. Fox did, solely on his own initiative, without prior suggestion on the part of any party, raise for the first time an ethical question concerning the right of the Ford firm to have and to continue representation of the Kalamazoo Board of Education; that this question was raised by the Court all or in part on a presumption he had made concerning the nature of services rendered by the Ford firm in the preparation of the May 7th Plan; that this presumption of necessity arose and it stemmed from sources totally unrelated to anything that had transpired in the course of this litigation and of necessity stemmed from the personal bias and hostility the Honorable Noel P. Fox then had felt and now feels against the Board of Education, its attorneys, and all persons associated with it in the defense of its positions asserted in this lawsuit; that the presumption was fixed in the mind of the Honorable Noel P. Fox to the point where he interrupted Mr. Staton and refused him opportunity to state otherwise; that the Court's mind was already rigidly fixed and that this is evidenced by his own language: "I can't conceive how you can be in this position". That in the course of the colloquy above quoted, the Honorable Noel P.

Fox departed fully and completely from his role as impartial judge and joined in and assumed the initiative of arguing Plaintiffs' position in support of the protective order and arguing his own position concerning the ethical impropriety of the Ford firm's representation of its client and the resulting legal and ethical limitations on the Ford firm's rights to take the pre-trial depositions of Dr. Luff and Mr. Thompson. That the Honorable Noel P. Fox formed a fixed belief the Ford firm had an attorney-client relationship with Dr. Luff and Mr. Thompson as Board members, and this is clear from the Court's own language wherein he states: "Well, what are you doing, you are deposing your own clients and you are discovering your own clients' previous action which you participated in as a law firm." That as requested by the Honorable Noel P. Fox, the parties did, within the ten days allowed, file simultaneous briefs; that because the ethical position of the Ford firm had been raised, this firm did, of necessity, immediately upon filing the briefs, cease active representation of the Board of Education in this cause, and proceeded immediately to obtain consent of the Honorable Noel F. Fox to make full disclosure of all pertinent and relevant facts to an appropriate committee of the Michigan State Bar Association for a prompt and complete determination concerning its right to fully and completely represent the Board of Education in this litigation; that the Honorable Noel P. Fox did consent subject to the limitation all materials to be presented would be first presented to Plaintiffs' counsel for approval and supplementary comment as desired; that in compliance with said request a complete presentation and disclosure of all material and relevant facts pertinent to the ethical question raised by the Court, verified and documented in every detail, was submitted to Plaintiffs' counsel, Mr. Enslen, who promptly and courteously approved same without supplementary comment; that said approval was set forth in a letter dated May 19, 1972, addressed to Honorable Noel P. Fox, the pertinent and applicable part of which is as set forth in the quote that follows:

> "We have not had an opportunity to review all of the documents in detail, however, it would appear that the issue raised has been correctly stated by the Ford law firm. The cronology of events also appears to be correctly set forth. We are, of course, not privy to communications between the

Ford firm and their client, some of which are contained in the material. We do not believe that Mr. Station would withhold any pertinent information, however."

"While not being certain what it is we are to do in this matter, we do wish the Court to know that we are not opposed to the submission of these materials to the Court, nor are we opposed to their submission to a State Bar Committee. Further, we believe the materials go directly to the issue raised by the Court."

That on May 22, 1972, all pertinent material was submitted to the appropriate committee of the Michigan State Bar on Professional Ethics, and on June 5, 1972, this committee, through the person of Glenn M. Coulter, rendered its informal opinion in the form of a six-page letter; that a copy of same is attached to this affidavit and incorporated by reference herein; that your affiant is informaed and believes full and complete presentation of every material fact was made to this committee; that this committee fave full, complete and deliberate consideration to the matter as presented and rendered a unanimous opinion save for a single dissenting member; that the committee found no ethical limitation on the right of the Ford firm to take the depositions of Dr. Luff and Mr. Thompson save those concerning witness harassment as is imposed upon any attorney under the present Code of Professional Responsibility, and found no ethical reason the Ford firm could not properly continue its representation of the Kalamazoo Board of Education in this litigation. In making this finding, the committee recognized the potential value of the prior representation of the Ford firm and the background knowledge it had acquired, and indicated that such knowledge actually offered Mr. Staton, if used in good faith, an opportunity as a lawyer to do a public service and greatly assist in building a full record for the information of the Honorable Noel F. Fox as to all issues involved. That the language of said opinion insofar as here applicable is as follows:

"In fact, if Mr. Staton all in good faith uses the related Court Rules and the other discovery rights which he has along with the very considerable background knowledge of his firm as to such Board problems he has an opportunity as a lawyer doing public service to greatly assist in building a full

record and in fully informing the Court as to the issues involved."

That notwithstanding the opinion of the committee, the Honorable Noel P. Fox set Plaintiffs' motion for protective order for additional argument, and stated in his opening comments the specific issue to be argued. This specific issue was the issue which the committee had decided. That the opening comments of the Honorable Noel P. Fox specifying this issue for additional argument appear at Page 2 of the transcript of said argument and are as set forth in the quote that follows:

> "I am going to give the parties a half an hour on each side to argue propositions on the motions before the Court. *They pertain whether there is a prohibitive conflict of interest, and what effect, if any, is had upon the request to depose former board members who had the confidence of attorney-relationship with the defendant firm, as for discovery purposes.*"

The Plaintiffs then proceeded to reargue as to this issue. Plaintiffs' argument advanced by both Mr. Enslen and Mr. Hummer consumes approximately 18 pages of the transcript. This argument was made with but a single interruption from the Honorable Noel P. Fox, and then only to reassure counsel; that the argument of Mr. Staton on behalf of the Kalamazoo Board of Education extends from Page 20 to Page 48 of the transcript, and in the course of this argument the Honorable Noel P. Fox interrupted counsel 19 different times; Mr. Staton attempted first to establish the essential character of these depositions and the need of his client for them; that almost immediately in the course thereof he was interrupted by the Honorable Noel P. Fox with the following comment:

> "THE COURT: Doesn't your law firm know all of those things? Weren't you counsel all during this time?"

When assured by Mr. Staton his firm did not, the Honorable Noel P. Fox then, on his own initiative, turned to the ethical position of the Ford law firm. At Page 22 he interrupts Mr. Staton's argument to interject comments as are set forth in the quote that follows:

"THE COURT: Isn't it a delicate situation for the Board – for the counsel, who is obviously clearly on both sides of the issue, the state court action – and the pleadings in the state court action clearly demonstrates that you were on both sides of the issue, strongly on both sides of the issue all the while your firm was at the same time general counsel, advisor, legal advisor upon whom the Board relied to make their judgments?

MR. STATON: I would –

THE COURT: It is a delicate situation in the practice of law, it seems to me."

As Mr. Staton continued to address himself to the Board's need for the Luff and Thompson depositions, he was twice interrupted by the Court, who now openly argued the unethical position of the Ford firm. The first interruption and argument appears on Page 23 of the transcript of said arguments and is as follows:

"THE COURT: I am not saying 'do you need it?' I am saying as general counsel–

MR. STATON: Well, if the Court–

THE COURT: –don't you– having had the confidence, having had the very personal confidence of these board members–"

The second appears at Page 26 and continues through Page 31, and is as set forth in the quote that follows:

"MR. STATON (continuing) Now they being the key witnesses, they being material, for the reasons I have indicated–

THE COURT: Also board members who relied upon your judgment as lawyers.

MR. STATON: I realize–

THE COURT: And had your confidence as lawyers.

MR. STATON: Your Honor, may I address that in due course? I will take it up now, if you wish; but I assure you I

am going to turn to it. I am going to come to it, and I will try to address it fully and by itself–

THE COURT: Well, didn't they at that time – I am just asking you.

MR. STATON: Pardon?

THE COURT: Didn't they enjoy your confidence and you theirs and their reliance upon you as general counsel for advice and counsel on legal matters?

MR. STATON: Absolutely not, your Honor. Our client, and the only client we have, is the entity. We followed the law and –

THE COURT: But the entity doesn't exist in a vacuum. It can only operate through individuals, and they were members of the entity at that time, and the functioning members of the entity, weren't they?

MR. STATON: But we do not represent each individual member and could not represent each individual member. Many times, as the board is presently constituted, it has members of adverse interests, totally adverse interests, just as these members have. No lawyer, under the canons of ethics, could conceivably represent all the individuals on that board, have confidential relationships with all of the members on that board, because they have conflicting interests.

"THE COURT: But at that time when you were representing them, they relied upon you to defend the case in the state court, didn't they?

MR. STATON: Yes. And the basis of the defense in the state court has nothing to do with nullification of any service that we perform now or expect to perform for this Court in this case in the future.

THE COURT: There was considerable conflict of positions, though, wasn't there?

MR. STATON: None whatsoever. We see no conflict whatsoever. The position we took in the Conant litigation

was that that board had the right, and it passed – at least had the right to pass the plan. We take no position contrary to that at this time.

THE COURT: You went further than that in your answer, Paragraph 12 of the Complaint. One of the principal issues was that the plan was arbitrary and capricious, that it was premature, and that it wasn't well considered; and you denied specifically all of those factors.

MR STATON: And the Federal Court Rules will permit a lawyer in the same identical litigation to assert contrary positions for the same client, alternative, adverse positions can be pleaded in this Court for the same client in the same lawsuit.

Now why can't a lawyer for a given client, the school board, take contrary positions in the pleadings at two different intervals and two different courts at two different times if he can do it for the same client in the same court at the same time?

THE COURT: You couldn't take that same position in this Court on these issues in that manner, and you couldn't take the same position you are taking in this court in the state court at that time.

MR. STATON: The actions of the client, whether they be arbitrary, capricious or not is a factual question to be determined. Whatever they are, the actions of the Board, they weren't the actions of the attorney. They were the actions of the Board.

I think in two different litigations an attorney can, for the same client, very clearly assert two different legal propositions with reference to the same facts taken by his client.

THE COURT: Well, they can take positions in the alternative, but not direct conflicting positions, as they are – as you took in that case and as you are taking in this case.

MR. STATON Well, I beg to differ with you, your Honor. We have an impasse. I am trying to assist you. When

we reach a point where I can be of no further assistance, I think, with all due deference to the Court, that we can do precisely what was done in this case, and that it doesn't nullify our work product, and it is not inconsistent and it isn't in any way a conflict of interest. It is a situation where a lawyer is required to represent a client, and could in the same case plead alternatively, can now plead alternatively and also plead inconsistently, and I don't see any ethical question there presented.

Now, again let's get back to the question – with deference to the Court, let's get back to the question whether we are going to get a fair trial here by having full and complete discovery proceedings, something that is ordinarily given to every litigant in the Federal Courts, usually without serious question. At least in my experience I have not had a serious question attaining that.

Now –

"THE COURT: You will get a fair trial in this Court.

MR. STATON: Well, I am sure that is true, your Honor, but I can't do it without this kind of discovery, and I don't think any lawyer can do it."

That rebuttal arguments were completed and the matter taken under advisement; that on July 13, 1972, the Honorable Noel P. Fox ruled in an Opinion from the Bench; that the exact language of said ruling is as set forth in a transcript thereof and as is set forth in the quote that follows:

"THE COURT: Presently before the Court in this school desegregation case is the Plaintiffs motion for a protective order which would regulate or bar defendants from taking the discovery depositions of two members of the School Board, Dr. Andrew Luff and Mr. Edward Thompson, who were members of the Defendant Board on May 7, 1971 when the attendance zone plan presently in issue before this Court was adopted.

This motion raises the issue of whether defense counsel, in light of their past representation of Defendant Board, are likely to discover any facts relevant to this case by taking the testimony of the proposed deponents.

In considering the corollary question of whether the taking of the contested depositions would be likely to prompt needless annoyance, harassment and friction, the Court is concerned with the further issues of whether the law firm of Ford, Kriekard, Staton and Allen, hereinafter referred to as 'the Ford firm,' should properly conduct these depositions, even if authorized, in view of the past and present attorney-client relationship.

With regard to the Defendant's right to take the depositions of Dr. Luff and Mr. Thompson, the Court is persuaded that in view of the central role played by these men in the Board action here contested and the likelihood of their appearance as witnesses in the ultimate trial of this cause, discovery depositions are appropriate.

However, the basic concern beneath Plaintiffs' motion for protective order does appear to the Court well founded in view of the current circumstances in this case. This legitimate concern springs not from the mere prospect of examination, but rather from the prospect of examination by the same attorneys who for over twenty years have acted as counsel and fiduciary to the Board and, necessarily, individuals acting in their official capacities as Board members, which members actually constitute the School Board. Board members are named as parties to this action, so that the reality of the personality of the living Board would be jurisdictionally before the Court. In this sense Defendant counsels owe a duty to these named Board members.

During the entire period of their service on the Kalamazoo Board of Education, including the period during which the Board considered and adopted the May 7th plan of school desegregation, Dr. Luff and Mr. Thompson enjoyed an attorney-client relationship with the Ford firm with respect to the School Board's activities. The Court must presume

that confidences and opinions were shared between these Board members and the Board's counsel. That these individuals now resent counsel employing such confidences and such relationship in a detailed, and, now, antagonistic manner is not surprising.

In due respect for the civility of the situation, such turnabout should have been avoided.

Counsel for the Board has urged that they have never represented the individuals, and they continue to urge that they do not represent the individuals; just the entity of the Board.

While this may be mechanically true and a mechanical interpretation of the law, the fact remains that the Board of Education cannot and does not exist in a vacuum. It can only exist through its living human being members acting in their official capacities, and in no other way. It just doesn't exist in thin air.

An attorney representing a school board should owe a duty of confidentiality to persons who are the only available conduit of information between the client corporate body entity and the attorney.

The long recognized fundamental principle of confidential attorney-client communications and relations can have no meaning absent recognition of the role of human interaction. The concept of an insensible artificial entity as the sole client, while useful and appropriate for many purposes, dehumanizes the attorney-client relationship and emasculates the attorney and client privilege if applied in this area blindly without flexibility.

The Court is aware of the citations and the American Bar Association's Code of Ethics, ethical consideration 5-18 and 5-15 cited by Defendant's in their brief.

The Defendants urge upon the Court that there is no code in this area.

In an early case in the Sixth Circuit, *In re Boone*, 83 Fed. 944 (1897) – I guess this is the Northern District of California Circuit Court of Appeals – it says:

> "This general and well-settled rule is not found in any positive enactment. Indeed none is necessary. It springs from the very nature and necessity of the relation of attorney and client and finds its highest sanction in the confidential character of the relationship."

As the Court long ago in the *Boone* case observed:

> "The relation of attorney and client is one of mutual trust, confidence, and good will."

Only human beings are capable of mutual trust, confidence, and good will. An artificial body corporate has no such capability.

Given this relationship, tensions, which otherwise might well be avoided, can be expected when a client's entity's official spokesman and representative is confronted by the counselor-turned inquisitor.

In light of the circumstances of this case and the considerations set forth above, this Court finds that, while disqualification of the Ford firm from further activities in this case is inadvisable, some supervision over the depositions of Dr. Luff and Mr. Thompson is called for.

The most advisable course is for other attorneys than members of the Ford firm to conduct the depositions. And I am sure there are able attorneys in the Kalamazoo area who can quickly adjust themselves to the fact situations sufficiently to conduct such depositions.

With regard to the manner of the taking of depositions by such attorneys, the applicable discovery rules permit quite broad latitude. Rule 30 (c) of the Federal Rules of Civil Procedure even permits the asking of questions which might be objectionable at trial, since the sole purpose is the re-evaluation of the relevant facts as well as irrelevant facts which may lead counsel to relevant facts for background purposes as dis-

tinguished from formal presentation to a trier of facts. Such flexibility in the form of questions does not appear prejudicial, since only a discovery deposition is involved. No jury will ever, even ultimately, enter into the picture on those questions which may be irrelevant. They will only be referred to in those areas which are actually relevant.

With regard to the ethical issue, the Court finds that the Ford firm has violated no principle of the American Bar Association's Canons of Ethics, and because of the present posture of the case, they should remain and participate in the trial of the cause, conduct it.

All right. That is all."

That this affiant believes the action of the Honorable Noel P. Fox commencing with the first arguments on Plaintiff's motion for protective order as a part of the May 1, 1972 pre-trial, and culminating with his July 13th ruling as above quoted, exhibits personal bias and prejudice in favor of Plaintiffs and Board members Luff and Thompson as witnesses supportive of their position, and a personal bias and prejudice against the Kalamazoo Board of Education and the Ford firm as their counsel, and states the following as and for its reasons for this belief:

One – That the pre-trial depositions of Board members Luff and Thompson were necessary and this proposition should be axiomatic and unquestioned under Federal Court practice; that without dispute said witnesses were totally adverse to the Kalamazoo Board of Education; were totally identified with the cause Plaintiffs assert; were knowledgeable as Board members of the Kalamazoo Board of Education on most intimate details of all aspect of this case and Defendant's defenses, and possess beliefs, which if foundationed in fact, could alone control the ultimate result of this litigation; that your affiant makes this last statement on information and belief and on the basis of the statements made by witness Thompson already quoted in this affidavit on Page 16 and here requoted for convenience as follows:

"I fear that these names are misleading in that the plan leaves our schools in the grip of habits and fears built up by decades of *compulsory segregation* in the schools of this city.

After decades during which black people were *compulsorily* deprived of their right to neighborhood schools, *** "

That such fact and practice notwithstanding the Honorable Noel P. Fox was prepared, when the motion was first argued, before opportunity was given to Defendant's counsel for argument, to give each deponent the protection asked; that this appears by undisputed fact from a direct quote appearing at Page 18 of this affidavit; that the Honorable Noel P. Fox' opinion was not changed by the briefs of the parties, by the opinion of the Ethics Committee, nor at the time of oral reargument on July 10, 1972; that your affiant states this must of necessity be true based upon the statements made by the Honorable Noel P. Fox at said argument, when he by interruption states:

> "Doesn't your law firm know all of those things? Weren't you counsel during all of this time?"

previously quoted at Page 27 of this affidavit; that the language of the Honorable Noel P. Fox in his opinion of July 13, 1972 indicates as to this axiomatic proposition, even after all briefing and argument, his opinion as concerns the necessity of the depositions was only that they were appropriate, and even that conclusic was one he reached only after persuasion; that this is true appears from the very language used by the Honorable Noel P. Fox in his opinion.

Two – That the Honorable Noel P. Fox, solely on his own motion for the first time, injected the ethical question concerning the Ford firm's right to represent the Kalamazoo Board of Education; that this question was injected by the Court on the basis of presumptions he made concerning the nature of attorney-client services rendered by the Ford firm prior to the institution of this litigation and the services which it would be required to render in this litigation; that these presumptions were without basis in fact and were deprived, of necessity, from a personal bias and prejudice which the Honorable Noel P. Fox felt towards the Kalamazoo Board of Education and its attorneys; that in raising this ethical question the Honorable Noel P. Fox did make this presumption is based upon his own language as same appears in the transcript of the May 1 pre-trial proceedings and as quoted in this affidavit at

Page 19; that this presumption was a presumption without any basis whatsoever in fact, was established without dispute by the complete disclosures made by the Ford firm to the Ethics Committee of the Michigan State Bar, undisputed by Plaintiffs' counsel and taken as true by this committee and all others in any way concerned with this litigation; that notwithstanding the undisputed character of this representation, the Honorable Noel P. Fox remained convinced the opposite was true and evidence of this fact appears from the language of the Honorable Noel P. Fox in setting the ethical question for additional argument on July 10, 1972 and in the statements made by him in the course of that reargument; that this language specifically appears on Page 27 of this affidavit when the issues to be argued were specified; and on Page 29 when the Court insists the Ford firm was nullifying past services by occupying in the Court's mind a conflicting position in the State Court litigation filed to prevent the passage of the May 7th desegregation plan; that the presumptions which foundationed the ethical question were in fact totally without basis, is confirmed ultimately by Honorable Noel P. Fox' own ruling the Ford firm had violated no principle of ethics as admitted by him in his own opinion as previously set forth in this affidavit.

Three – That your affiant states on information and belief the Honorable Noel P. Fox knew the mere raising of the Ethical question would stigmatize the Ford firm with unprofessional conduct before an entire community, and in litigation of great consequence and notoriety; that he knew such charge would deprive the Kalamazoo Board of Education not only of its choice of counsel but of counsel, because of background and experience, best able to represent it, with consequent additional delay and expense; that he knew such charge would require for refutation delay in the progress of the case until the ethical question had been of necessity resolved and its resolution would require the Kalamazoo Board of Education to disclose for all purposes of the litigation all attorney-client privileged information it had in connection with any matter related to the May 7th plan, its development and preparation, its passage, and the course planned by the Ford firm in the present litigation. It is this affiant's belief the Honorable Noel P. Fox could not, based solely on the aforesaid presumptions now clearly established as false, place the Kalamazoo Board of Educa-

tion and its attorneys in such a position without such deep personal bias and prejudice against them as tc render fair trial for them under him an impossibility.

Four – That the parties seeking relief under this protective order were the Plaintiffs; that the sole parties the relief sought could benefit were witnesses Luff and Thompson, neither of whom had formally, nor in Thompson's case, at all, sought such relief; that the only benefit Plaintiffs could have from such relief is the concealment of truths adverse to their case; that the sole benefit which Luff and Thompson could and which they have derived from the protective order is to shield them from examination by counsel best able, in the light of background and preparation, to conduct said depositions; that to the extent either Plaintiffs or witnesses Luff and Thompson were and are protected by the order of the Court, the truth is less clearly exposed, the record is less complete and the Honorable Noel P. Fox can only be the less informed on the issues in this case; that your affiant states on information and belief the Honorable Noel P. Fox, when he made his July 13, 1972 order from the Bench, knew the limited extent and nature of Plaintiff's benefits, the limited extent and nature of witnesses' Luff and Thompson's benefits, knew the adverse effect its ruling would have on truth discovery in this case, and further knew, because of the background of the Ford firm, it occupied a peculiarly unique position to aid in truth discovery if this was his interest; that your affiant states the Honorable Noel P. Fox had to have known this last stated fact because of the language of the Ethics Committee in commenting on the ethical position of the Ford firm wherein this committee specifically recognized the unique position the Ford firm held for service to the Court and the record in taking these depositions. This language is specifically quoted in this brief at Page 26; that notwithstanding this knowledge the Honorable Noel P. Fox did order depositionary protection for Luff and Thompson and this affiant states the Honorable Noel P. Fox could not, with full knowledge, have ordered relief of such limited and improper benefit to Luff and Thompson who had not sought it, with no benefit to Plaintiffs save truth obstruction and with such disservice to a Court's own truth discovery functions without such personal bias and prejudice for Plaintiffs and for Luff and Thompson as witnesses closely identified with

Plaintiffs as would, of necessity, render a fair trial before him impossible.

Five – This affiant understands and believes that the Honorable Noel P. Fox in his July 13th ruling on his motion for protective order has ruled:

1. That the Ford firm has an attorney-client relationship with Board members, past and present, as to all Board matters. This belief is based upon the language of the Court used in said ruling quoted as follows:

> "During the entire period of their service on the Kalamazoo Board of Education, including the period during which the Board considered and adopted the May 7th plan of school desegregation, Dr. Luff and Mr. Thompson enjoyed an attorney-client relationship with the Ford firm with respect to the School Board's activities. The Court must presume that confidences and opinions were shared between these Board members and the Board's counsel. * * *
>
> "This legitimate concern springs not from the mere prospect of examination, but rather from the prospect of examination by the same attorneys who for over twenty-years have acted as counsel and fiduciary to the Board and, necessarily, individuals acting in their official capacities as Board members, which members actually constitute the School Board. * * "

That this belief is further based on the fact that the Honorable Noel P. Fox ruled identically as to present Board member Thompson and as to past Board member Luff when he knew from arguments Luff was a past Board member; that he did so knowing this must be true in fact because of the argument made by Plaintiff's counsel Mr. Enslen on July 10th, same appearing on Pages 5 and 6 exactly as appears as follows:

> "Mr. Thompson and Dr. Luff at the time the notice of deposition was received by the Plaintiffs, were present members of the Kalamazoo School Board. That is in part meet today, *may it please the Court, because Dr. Luff did not seek re-election and is no longer a member of the school board.*"

2. That the Honorable Noel P. Fox ruled it must be presumed from said relationship the Ford firm shared confidences with Board members and that such confidences would be employed were said depositions to be taken in a now-antagonistic manner, and that this, without surprise, would be resented by the Board members. That this affiant believes the Honorable Noel P. Fox did so rule because of the express language used in his ruling and as stated in the quote that follows:

"That these individuals now resent counsel employing such confidences and such relationship in a detailed and, now, antagonistic manner is not surprising."

3. That the Ford firm had made a turnabout from counselor to inquisitor and this was a turnabout which due respect for civility should have caused them to avoid; that this affiant believes the Honorable Noel P. Fox did so find and ruled as based on the language used by the Honorable Noel P. Fox on his ruling on Plaintiff's motion for protective order which insofar as is here applicable is precisely as appears in the quote that follows:

"In due respect for the civility of the situation such turnabout should have been avoided.

Given this relationship, tensions, which otherwise might well be avoided, can be expected when a client's entity official spokesmen and representative is confronted by the counselor-turned inquisitor."

4. That because of the existing attorney-client relationship between the Ford firm and Board members and because of the presumed confidences found to exist, the Ford firm could not conduct the Luff-Thompson depositions, and, of necessity, for identical reasons, could not conduct the deposition of any past Board member who, during the twenty-some years of this firm's representation, was a member of the Kalamazoo Board of Education.

5. That the Ford firm, notwithstanding his rulings as above stated, had violated no principle of professional ethics.

6. That the Ford firm should remain in this litigation, participate and in fact conduct the trial of the cause.

That these rulings, this affiant states on information and belief, create a situation rendering it ethically impossible for the Ford firm to continue in this litigation as this affiant's counsel. That of necessity these rulings apply not only to witnesses Luff and Thompson, but to all past Board members; that this is true because the Ford firm's representation has continued for some 20 years, because the litigation involves a period of time extending for at least 20 years prior to suit filing, and because each Board member may be a material witness on issues which involve any Board act, omission to act or Board motive that relates in any way to racial imbalance. If, as the Court ruled, the Ford firm does have the duty arising from an attorney-client confidential relationship to all Board members which disables it from deposing them as a necessary part of trial preparation, clearly the Ford firm has such conflict of interest as to render its continuation in this litigation unethical.

Canon 5 of the *Code of Professional Responsibility* prohibits duties to third persons which even *encroach* upon a lawyer's exercise of independent professional judgment on behalf of a client. The language of *Canon 5* is as follows:

> "A lawyer should exercise independent professional judgment on behalf of a client."
>
> *Ethical Consideration 5-1* under said *Canon* provides as follows:
>
> "EC 5-1 The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client."

Any question concerning the applicability to present facts is totally removed by *Ethical Consideration 5-18* which provides as follows:

> "EC 5-18 A lawyer employed or retained by a corpora-

tion or similar entity owes his allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity. In advising the entity, a lawyer should keep paramount its interests and his professional judgment should not be influenced by the personal desires of any person or organization. Occasionally a lawyer for an entity is requested by a stockholder, director, officer, employee, representative or other person connected with the entity to represent him in an individual capacity; in such case the lawyer may serve the individual only if the lawyer is convinced that differing interests are not present."

The Honorable Noel P. Fox, in order to prevent the Ford firm from taking the Luff-Thompson depositions, first, himself, raised an ethical objection based upon nullification of prior services; that he persisted in this argument long after undisputed evidence established it without foundation and long after it had been ruled ethically proper by the appropriate State Bar Committee; that when, however, it was necessary by his rulings preventing the Luff-Thompson depositions to create an unethical situation for the Ford firm, he did so without hesitation; that your affiant states on information and belief that the Honorable Noel P. Fox knew when he made his rulings he was creating an unethical situation for the Ford firm under *Canon 5*, and your affiant asserts this must be true since the Honorable Noel P. Fox indicated his awareness of *Ethical Consideration 5-15* when he cites it in his Opinion with language exactly as follows:

> "The Court is aware of the citations and the American Bar Association's Code of Ethics, ethical consideration 5-18 and 5-15 cited by Defendants in their brief."

That in creating by his ruling an unethical situation for the Ford firm, the Honorable Noel P. Fox has himself violated *Judicial Canon 11*, which imposes upon him the duty of correcting, not creating, unprofessional conduct on the part of counsel. That the precise langugage of *Judicial Canon 11* is as follows:

> "Unprofessional Conduct of Attorneys and Counsel. A judge should utilize his opportunities to criticize and correct unprofessional conduct of attorneys and counsellors, brought to his attention; and, if adverse comment is not a sufficient corrective, should send the matter at once to the proper investigating and disciplinary authorities."

That the Michigan State Bar Committee on Professional Ethics considered of necessity the relationship existing between the Ford firm insofar as it related to the right of said firm to take the depositions of Luff and Thompson; that such a consideration was necessary for the committee to determine whether or not there was or was not any ethical reason limiting the right of said firm to take those depositions; that any question concerning whether or not the committee did consider this relationship and its effect upon the Ford firm's right to take the Luff-Thompson depositions is made clear by the language of the committee's opinion, the language, insofar as is here applicable, being as follows:

> "You are proposing by the discovery process in the local Federal Court, under the privileges of Rule 32(a)(3), to discover by depositions against members Luff and Thompson of the Board. This has raised the question as to whether ethically they are not your own clients in effect by reason of their membership on the Board and that you cannot discover against your own clients.***
>
> A Board of Education is a distinct entity and, therefore, in matters of litigation its individual members are not to be considered as such a part of a Board as to admit the assumption that in representing the Board of Education in present discovery proceedings, and the like, you are in effect discovering against your own clients when you seek depositions from former or existing members of the Board. It seems to be clear that the Board of Education under the School Code of Michigan represents the School District and not its members."

Though the committee found nothing to criticize concerning the Ford firm's contemplated depositions of Luff and Thompson, the Honorable Noel P. Fox, in his rulings, described this firm as "counsellors turned inquisitors", making a turnabout which due respect for civility should have caused them to avoid; the use of this language to describe the ethically proper actions of the Ford firm, your affiant believes, exhibits personal bias and prejudice on the part of the Honorable Noel P. Fox against the Kalamazoo Board of Education and the Ford firm; this affiant further believes the Honorable Noel P. Fox cannot alternatively and inconsistently enforce and ignore the *Canons of Professional Ethics* depending on

the needs of the Plaintiffs and violate the Canons of Judicial Ethics which he is honor-bound to follow, without such compelling impersonal bias and prejudice towards the Kalamazoo Board of Education and the Ford firm as its attorneys as clearly would and will deprive the Kalamazoo Board of Education of and from any semblence of fair trial in this litigation.

C-5. DELAY – TRIAL ON MERITS.

The Honorable Noel P. Fox, before the preliminary injunctive order was entered, knew and realized the fundamental importance of a speedy hearing on the merits of this case and expected to set the case about the third week in October, 1971; that this appears from a transcript made of proceedings had before the Honorable Noel P. Fox on the hearing for preliminary injunction; that Page 26 and 27 of said transcript, insofar as is here applicable, are as set forth as follows:

"MR. STATON: I couldn't do that, your Honor, and I do want to have a hearing, a full hearing as to whether this is or is not de facto.

THE COURT: Well, we will have a full hearing on the merits of the case. A complete full hearing on the merits of the case, but we are dealing now with an emergency.

MR. STATON: Well, I agree with that, your Honor, and this is what I am trying to point out. Here is what Mr. Jones has said. Now you told us to come here and do something and we do want to do something, but I am trying to tell you what I am not prepared to do, and what I would like to have an opportunity to do at far greater length, I am not prepared and haven't understood and didn't believe that we would be called upon to prove the merits of our case, that is to say, that this is truly just de facto and not de jure. On that, I would like to have a chance to have a full hearing on the merits of that question.

THE COURT: You will have it.

MR. STATON: That, I take it, isn't in issue in this hearing.

THE COURT: And I am going to try to set it about the third week in October, if I can."

That the Sixth Circuit Court of Appeals in refusing to set aside the preliminary injunctive order of the Honorable Noel P. Fox, recognized in stating its denial the fact that an early preplenairy hearing on the merits of the case had been scheduled. In a per curiam opinion decided and filed on August 30, 1971, the following language appears on Page 2.

> The District Court has scheduled an early plenary hearing on the merits of the case. At this hearing the defendants-appellants will have an opportunity to present all further objections which they may have to the attendance plan implemented by the preliminary injunction."

That the hearing on the merits scheduled for October was not held; that in the months following the preliminary injunctive order a financial crises was precipitated by the failure of millage elections, culminating in the contemplated termination of 103 teachers, 26 of whom were black, as the least objectionable of possible alternatives, all of which were undesirable; that on September 24, 1971 Plaintiffs filed a motion to restrain the proposed teachers' terminations because of the effect on black teachers and the District's program to racially balance faculty and staff; that the Honorable Noel P. Fox granted Plaintiffs a temporary stay and set their motion for hearing October 1, 1971; that in giving this hearing the Honorable Noel P. Fox adjourned all other pending matters save habeus corpus proceedings; that after a two-day hearing, a preliminary injunction was entered by Honorable Noel P. Fox preventing the proposed teacher termination; that subsequently through special legislation a millage election was held and sufficient millage carried to finance the District through the 1971-72 school year, rendering the teacher termination and the Court's injunctive order a moot question; that on November 23, 1971 the Court conducted its first pre-trial hearing with reference to trial on the merits, and ordered the parties at this pre-trial, through pre-trial discovery, to establish all undisputed facts by stipulation, put all statistics in quick compilation form; prepare a pre-trial order listing witnesses to be called, all undisputed (disputed?) facts and disputed issues of law, all exhibits separately

listed with objections stated and those unobjectionable; that foreseeable evidence questions were to be briefed and discovery motions were to be cooperative and voluntarily disposed of and would not otherwise be heard nor considered by the Court; that the exact language of this pre-trial order appears at Pages 3 through 5 and is as set forth in the quote that follows:

"THE COURT: I suppose we can have a conference this morning to make sure that we proceed along the line that will best accomplish a well ordered trial, and that only those facts that are undisputable – or, that are disputable will be tried. All the facts that are undisputable – and I use the term "undisputable' advisedly. Not 'undisputed.' There is a distinction. There are many facts that are apparently disputed, but when you look at them they are undisputed. And I want the parties in the meantime between now and the time that I set the case for trial to concentrate on that kind of a stipulation, namely, have all the undisputable facts in a stipulation. This requires the kind of cooperative work which is exemplary in the results of the election. And then those which are actually disputed, it may be that the inference to be drawn from the facts may be disputed. The facts themselves may be undisputed, and of course once the facts are in, then the inferences to be drawn are for argument and for briefs.

You will on your own, you will consider this what I am putting on the record now and what I have put on the record as an order of the Court, and you will meet at your convenience. I won't fix the time for your meeting. If you have problems in getting together and need the Court's assistance in fixing the time, I will be ready to aid you in that respect.

I would like to have all statistics that you will use put in the form where there can be a quick compilation, where the compilation is present as well. This will expedite the trial time and keep the trial time to a minimum.

And I would like to have you also prepare a pre-trial order in which you list all of the witnesses that you intend to call. It will contain all of the undisputable facts and the disputed issues of law.

You will list all of your exhibits. And those exhibits to which there are no objections, list them in one category; and the exhibits to which there are objections, make your objections specific. List them in that manner.

Identify your expert witnesses as such.

Where there are foreseeable questions of evidence, brief them.

If there are any special motions in the area of discovery, before you come to court you must make a conscientious effort to resolve the difference. And if you cannot resolve the difference, certify the fact of your inability to resolve the difference, and the reasons why you are unable to resolve them. Only then will the Court consider a motion for discovery or to produce documents. This is within the intent of Rule 1 and the discovery rules, namely, that these be conducted by the parties with a minimum of Court supervision and a maximum of voluntary cooperation."

That in said pre-trial the Honorable Noel P. Fox set a deadline for pre-trial procedures as the last Friday of the first week of January and announced his expectations to try the case on the merits sometime in February; that the language of the Honorable Noel P. Fox so setting the deadline and proposed trial date appears at Page 6 and is as set forth in the quote that follows:

"MR. STATON: Is there any kind of a deadline, and if so, what is that deadline so that we can start working towards that?

THE COURT: I would like to have you work toward the Friday of the last week – or, the first week in January. Now I can't give you a firm date, but I have told you that I am going to try to try it – to try to fix the date sometime probably in February. I am saying sometime probably in February. I am saying sometime probably in February because there are priority cases which we have on our calendar, and I am sure that I will have some priority criminal cases that will have to be disposed of before I can get to this case when I return from my assignment in the Middle District of

Florida. And I am supposed to terminate that at approximately the – on the 7th of January. But from what I understand it is going to be not a very easy case. A complicated case of conspiracy with multiple defendants and supposedly a very grave criminal situation. And right now from as much as I can gather, it is about as long as a piece of string how long it will take me to try it."

That both because of calendar conflict and the impossibility of the parties' completing pre-trial orders of the Honorable Noel P. Fox as set forth in the November 23, 1971 pre-trial, the case was not tried on its merits in February, but a second pre-trial hearing on February 16, 1972 was scheduled; that pre-trial progress was discussed and the case set for the subsequent pre-trial on May 1, 1972, that being a date on which the parties reasonably expected pre-trial proceedings to be completed; that on May 1, 1972, pre-trial proceedings had not been completed and the parties were without information and guidelines as to time for completion and anticipated trial date; that in the course of these proceedings the unimportance of delay was emphasized by Plaintiffs' counsel in language exactly as set forth in the quote that follows:

"MR. ENSLEN: * * * I understand Mr. Staton's concern, and we all share in it. We want to get on with the litigation. But I think the point that Mr. Lucas made – and I would like to make – on the effort, is that there is no evil in a desegregated school district, and Kalamazoo has a desegregated school district today. All the Federal cases and the Federal Constitution point out that that is not an evil. That is taken care of. Delays, therefore, can not harm any citizen of Kalamazoo, for we do have a desegregated school district today.

The date of the trial is important to all of us, but it would be exactly reversed if we had a segregated school district today. As a matter of fact, there are even two Michigan State cases that speak on that point, which I brought along today from the Court of Appeals, indicating simply that the school board has the power to desegregate a school district, and there is nothing wrong about that. That is

not under question or attack here. We are proceeding as fast as we can, but the panicky is not as big a panic as it was before we started in September, when we did have the evil of a segregated school system."

That this assertion was unchallenged by the Honorable Noel P. Fox; that as of the date of pre-trial three separate sets of requests for admissions with interrogatories served on Plaintiffs were unanswered and were from one to two months overdue; that interrogatories served on Defendant Michigan State Board of Education and Defendant Dr. Porter by Plaintiffs were unanswered at pretrial date and were about 30 days overdue; that in the course of said pre-trial proceedings, Plaintiffs emphasized the period of time they would require for preparation, and in this connection emphasized the scope of the task of pre-trial discovery, the possible unavailability of expert witnesses, new areas requiring preparation of proofs arising since suit filing, the need for all discovery to be completed before their experts could prepare their testimony, and the time required for FHA investigation and proofs, among others; that because of the failure of the parties to accomplish the Court's pre-trial orders, Mr. Staton, attorney for the Kalamazoo Board of Education, in clear language, asked the Court for assistance; the request is set forth on Page 32 of the transcript of said pre-trial hearing in language exactly as appears in the quote that follows:

"MR. STATON: I realize that.

THE COURT: And the Court has adjusted its calendar to fit that purpose, and I don't know that the Court can do any more at this point.

MR. STATON: What the Court can do now, and what I am asking the Court to do is to make these parties, and all of us, specifically state as nearly as we can what we have to do and to set forth the guidelines as to when it has to be done. It is as important that this case be tried as it is that this – that this case be tried with the expiration of every possible ramification. Now Kalamazoo has no suburban areas involved in its busing."

That failing to get such assistance from the Court prior to the noon recess, Mr. Staton, during the noon recess and in conference

with the parties, developed a proposed pre-trial schedule setting forth that which the parties respectively required and the dates on which they reasonably expected to be able to perform, culminating in the accomplishment of all pre-trial proceedings by October and evidencing the clear possibility of a November trial; that a statement of the pre-trial guidelines and schedules as agreed to by the parties was transmitted to the Court immediately after the noon recess and the language of this transmission is as set forth in the transcript of the May 1st pre-trial hearing commencing at Page 87 and culminating on Page 94, which is as set forth in the quote that follows:

"THE COURT: Now, what did you accomplish on your own?

MR. STATON: Well, I think in substance, your Honor, we have tried to discover what each of the parties thought they had to do yet. We have tried to get some kind of a–

THE COURT: Evaluation?

MR. STATON: –evaluation, timewise, something that we could work towards. I don't – I would like to do it much better, but apparently the plaintiffs feel that something like this, they can't really move until they get Porter's deposition and Answers to the state's Interrogatories. The State has indicated that they will get the Interrogatories and Answers to Interrogatories on or before May 15th, and that the state will–

"MR. ENSLEN: I don't think he said that.

MR. McCARGAR: I didn't say that. I said around the middle of the month.

MR. STATON: I will accept that. I thought that is what he meant in the spirit there. And I understood that they would have three depositions of the state's people, or may have, or perhaps will have Porter for sure, Mr. Wagner for sure, and Marvin Tableman for sure, and it was at least hoped that we would get the Porter deposition by June 1st.

MR. LUCAS: June 15th.

MR. STATON: Well, can you say– Well, all right.

MR. LUCAS: That is what I understood you to say, 'June 15th.'

MR. STATON: We have all our other deadlines, and I computed them in dates, and they were fabricated or based upon June 1st, because I thought that was what he had indicated at least for Porter.

MR. LUCAS: He did say the 15th.

MR. STATON: Now, after the Porter deposition, according to the plaintiffs, they require at least 60 days. And when I say 'they,' of course we get the same benefits in time, but they would require at least 60 days thereafter, making it August 15th, for all discovery to be completed.

Now, they indicate that they ought to have a 30-day period thereafter for discovery to be – for discovery results to be communicated to various of the experts, and they indicate that they would require 30 days there, an additional 30-day period for the Court's benefit. That goes back to October 15th. The first 30-day period is for communication of discovery results to the experts. That would take you to September the 15th. The next 30-day period is for the period of deposing, if the parties desire, the experts.

Now, I would like to move on, but I would like you to return to that, if I may. That takes you to October 15. Now, based upon experience, that would mean, then, the parties agreed that there ought to be at least a 15-day period, and I believe the Court has pretty well ordered it. At least by implication. There ought to be a 15-day period in which the parties themselves are forced to get together and meet together–

MR. LUCAS: I think it ought to be required.

MR. STATON: –and bring this all to a head.

THE COURT: My order calls for that, that all of the parties with authority be present.

MR. LUCAS: Hopefully, Judge, at that meeting we can have some proposed stipulations which we previously sent to each other, and sit down and see how much of the paragraphs we can agree on, and also agree at that time as to authenticity of documents and we won't have to go through the silliness of having so and so come and say, 'I am the custodian of this and I am producing it, except as to those people who wouldn't produce it any other way."

"MR. STATON: I don't think we need to have a lot of words on that, but I think we know what we want. We want to get the issue narrowed, all the stipulated facts, all the proofs narrowed, so we can have as short a trial as possible, if that is what you have in mind?

MR. LUCAS: Right.

MR. STATON: Now, according to the plaintiffs – they kind of form the cage of these cases. If they have tried one, they have tried more than I have. But based upon their experience, they have reasonable success–

THE COURT: If they have tried one, they have tried more than I have.

MR. STATON: They think we are speaking probably in terms of three weeks for trial, Judge.

MR. LUCAS: There was another point there. I thought we ought to be required to report to the Court in writing what agreements we had and what disagreements remained.

MR. STATON: Well, I think, Judge, you had expressed that in our original pretrial order, and you asked it to be in the form of a pretrial order. I don't disagree, except I think he has already expressed himself.

MR. LUCAS: What I was suggesting is that I would anticipate there might be some matters at that juncture that we have not agreed on that probably ought to have been agreed on, and that we should have a final pretrial meeting with the Court so that the Court can set it thereafter, and where the Court can go through and see what we have agreed

to and, frankly, from my experience, say, "Why can't you Gentlemen agree to this? This was proposed by the parties, either side, and you won't agree. Why not?'

THE COURT: I usually try to direct them to stipulate to all the undisputable facts, rather than undisputed facts.

MR. LUCAS: This is from my experience. From Courts knocking heads, we all end up to agreeing to a little bit more than we thought we could, and at that point the Court and the Court's calendar and everybody here with their calendar try to set a firm trial date.

MR. STATON: Now, based–

MR. LUCAS: Let me address another thing we didn't discuss. I understand that the Department of Justice is considering intervening here. This is one of the cases where they have certified or issued a statement the President's standards might apply, and there is some possibility they might intervene. I don't know what they are going to file. I know they have filed in Detroit, and I have talked to attorneys from the Department, and they have secured the data in Grand Rapids, and I take it they are preparing to intervene in Grand Rapids, so I would think the probabilities are high they would try to come in here. They are also going to file a brief in Benton Harbor, so I don't know why Kalamazoo should be an exception.

MR. STATON: If the interveners can come in, there is no reason – they can't delay the trial of the parties to the lawsuit, isn't that–

MR. LUCAS: Well, the question that is coming up at the trial in Detroit this month is whether the intervening plaintiff or defendant had–

"THE COURT: Yes, that would be a question. They have not filed to ask a 24 intervention, but have failed to file a pleading seeking what it is they are trying to do. Perhaps after the 9th I will have some idea of what position the government is going to take, but if they come in as a plaintiff, it seems to me they would be bound to – except

for good cause shown – to the discovery schedule that the Court has set.

MR. STATON: Well, I would feel that that is paramount. Intervention ordinarily shouldn't permit the intervener the right to delay the matter with the parties.

MR. LUCAS: I agree.

MR. STATON: What we would then be talking about, your Honor, it looks like around November the 1st, by this schedule, to have it to you in what you had originally asked us to have, with reasonable expectation for a three-week trial, a minimum of a three-week trial. Now, I want to say this: This is far better than nothing for me, because if it is the best that can be done and is what this Court will order, at least we have something definite for us to shoot at.

I have to say this, your Honor: I would like to try itmuch sooner, of course, and I would have to ask the Court to do that.

THE COURT: I will do the best I can to see if we can make it much sooner; but if this is what we have to do, I will–"

That thereafter when it appeared there was no possibility of a trial on merits before November, Mr. Staton asked and the Honorable Noel P. Fox refused to order as pre-trial deadlines the pre-trial schedule the parties had themselves agreed and as was necessary for a November trial on the merits; that the request for such an order and its refusal is as set forth in the langugage appearing on Pages 120 and 122 of the transcript of the pre-trial in the quote that follows:

"MR. STATON: May we have the clear understanding that if it is not to be tried, as I have requested, that the parties are by court order instructed to complete the discovery that they have outlined, within the deadline that has been decided in the court order – or, rather, in the conference today?

THE COURT: These are the targets. I want to see what

develops in the next month or two before I am going to set any specific date for court. You outline your program's necessities, and I am going to call meetings from time to time to see how well you are progressing, and try to set it definitely, as a target, the trial, no later than November. But it will be explored from time to time."

That thereafter and in the course of the May 1st pre-trial proceedings, the Honorable Noel P. Fox raised on his own motion the ethical position of the Ford firm to represent the Kalamazoo Board of Education in this litigation, and the raising of this issue; that the effect in terms of delay of this action of the Court appears earlier in this affidavit and will not be here repeated to avoid unnecessary repetition; that in the absence of Court ordered deadlines as requested, interrogatories from Plaintiffs to State Defendants, the answers upon which all subsequent discovery was predicated, have not as of this date been filed and the time schedule for all discovery has already slipped some two and one-half months behind that which was agreeable to the parties on May 1st; that your affiant believes the Honorable Noel P. Fox uses and has used the immense discretionary powers of his office to promptly and immediately serve the Plaintiffs, while he does, in the same litigation, use those same powers to delay and frustrate the Kalamazoo Board of Education in obtaining a hearing on the merits of this litigation; that your affiant believes this is action the Honorable Noel P. Fox could take only if he holds, as he does, a deep and overwhelming personal bias and prejudice for Plaintiffs and against the Defendant, Kalamazoo Board of Education: that every fact contained in this affidavit is true to this affiant's own knowledge or to the best of its information and belief.

Further this affiant saith not.

The Kalamazoo Board of Education

By: _____

Allan P. Tyler, its President

Subscribed and sworn to before me this 1st day of August, 1972.

M. FRANCES SMITH
M. Frances Smith
Notary Public,
Kalamazoo County, Michigan
My Commission Expires May 20, 1973.

FORD, KRIEKARD, STATON AND ALLEN

By: /s/ ARTHUR STATON, JR.
Arthur Staton, Jr.
Attorneys for Defendant
Kalamazoo Board of Education

Business Address:

1015 American National Bank Building
Kalamazoo, Michigan 49006

May 26, 1972

Mr. Arthur Staton, Jr.
Ford, Kriekard, Staton and Allen
1015 American National Bank Building
Kalamazoo, Michigan 49006

Re: *Michelle Oliver et al* vs. *Kalamazoo Board of Education, et al,* No. K88-71

Dear Mr. Staton:

The writer acknowledges your letter of May 22, 1972, dealing with the above captioned litigation and particularly dealing with the question of the ethical position of your law firm continuing in this litigation but also including the lesser question of your rights to depose Messrs. Luff and Thompson under Federal Court Rules, they being past and present members of the Kalamazoo Board of Education, which is the principal defendant in the litigation.

We have reviewed the several exhibits which accompanied your letter. It appears that these exhibits were prepared with the approval of Judge Noel Fox and with the knowledge of attorneys Enslen, Hummer and Lucas who are representing plaintiffs in this proceeding.

In making our comments concerning the particular problems of professional ethics involved we have read copies of the briefs submitted to Judge Fox by your office and by plaintiffs' attorneys. We have also carefully read your *Exhibit "J"* which represents an extended discussion or colloquy before Judge Fox concerning these particular problems and your professional position in relation thereto.

Your problem, as expressed by yourself and by Judge Fox, is one as to whether or not "the present litigation requires you to nullify prior professional services rendered the Board of Education, *or* as stated by the Court:

"Yes, whether you can depose them; and if you can depose them, whether you can cross-examine them, and also the

issue of your former representation. You formerly were general counsel for the Board when it drafted the plan that is in issue, and how can you challenge that plan now?"

Your exhibits state the nature of your earlier services and the advice given by your firm to the Board. These services do not indicate that you attempted to make decisions for the Board in respect to its planning on racial imbalance questions first presented as issues in the *Conant* case and subsequently presented by the Board Resolution of July 6, 1971 proposing to postpone action on the Board's previous plan of May 7, 1971. *It seems to be agreed by all parties that if your former relationship to the Board prior to May of 1971 resulted in developing or changing its conclusions in relation to the May 7th or prior plans, you probably should not appear again as counsel for the Board in this immediate litigation.* There is a lesser question of the extent of discovery which you may seek to assert by deposition process against Board members Luff and Thompson including that of your basic right of deposing these gentlemen.

Further elaborating on the issues and the immediate situation it appears from briefs, admissions of counsel or pleadings that you do not represent any of the present members of the Board of Education individually although they are joined and have been served as defendants herein. A lesser question was raised as to whether or not such individual defendant members of the Board should be presently represented by his or her independent counsel in this proceeding, but the present assumption appears that while these member defendants are not as yet defaulted, they do not require individual representation of legal counsel.

You are proposing by the discovery process in the local Federal Court, under the privileges of Rule 32 (a) (3), to discover by depositions against members Luff and Thompson of the Board. This has raised the question as to whether ethically they are not your own clients in effect by reason of their membership on the Board and that you cannot discover against your own clients.

Additionally, the Court and apparently on his own violi-

tion, has raised the general question of your now defending on behalf of the Board of Education its right by a Resolution, dated the 7th day of July, 1971, to refuse to place into effect a plan of established attendance areas for pupils originally approved by planning of the Board as of May 5, 1971. Such a problem is emphasized because your law firm gave approval to the established attendance area plan expressed in the May 5th Plan and you are now defending and contending for the right of the newly constituted Board as to its Resolution of July 7, 1971 to not place such a plan into effect but to adjourn it for a stated period of one year for further study and consideration.

We are constrained to say that the right of changing its opinion is clearly a prerogative of a Board of Education in this State. There seems to be no ethical objections of a law firm representing such a Board of Education, although it has given previous advice approving an attendance area plan, continuing its representation of the Board and contending for approval of the amended Resolution of the Board in not placing such a plan into effect.

A Board of Education is a distinct entity and, therefore, in matters of litigation its individual members are not to be considered as such a part of a Board as to admit the assumption that in representing the Board of Education in present discovery proceedings, and the like, you are in effect discovering against your own clients when you seek depositions from former of existing members of the Board. It seems to be clear that the Board of Education under the School Code of Michigan represents the School District and not its members.

There can be no question here that Mr. Staton's firm, through partner Ford, earlier advised the then constituted Board of Education that a proposed revision of attendance areas as expressed in the May 7, 1971 plan of the Board, such being an amendment of the earlier plan developed by the Board and expressed in the *Conant* pleadings, was within the control of the Board. The exposure of the proposed May 7, 1971 plan apparently created great concern within the related School District. Such was the result of this concern about the plan that in an intervening school election two of the members of the older

Board, who had given approval to the plan, were not returned to re-election on the Board. Bearing in mind that the advice of the Ford firm as to the May 7 plan was that such was within the control of the Board on the theory of de facto segregation problems being involved, the opinion was then sought by the Board from the Ford firm of its rights to suspend or not place into effect the May 7 plan. The Board thereupon received advice from Mr. Staton's firm that it was within its rights to place into effect a suspension Resolution dated the 7th day of July, 1971. Here again the advice of the Ford firm to the Board seems to have been limited entirely to the question of the Board's prerogatives and rights and does not represent any action by the Ford firm passing upon the merits of the Resolution and of the proposed action of the Board in suspending the May Plan. We are constrained to believe that a continuing representation of the Board of Education by the same law firm does not in any way limit its right to advise a Board on immediate procedural problems and rights and that the Board has the right to employ the same counsel concerning a problem such as its proposed Resolution of suspension of the May 5, 1971 plan.

It is to be noted that attorney Staton contends his duty is to place all facts and all legal arguments fully before the trial Court. There could be a question as to what he hopes to accomplish by discovering members Luff and Thompson, but within the latitude of the related Court Rule it appears that he presumably in good faith will use this discovery in an attempt to aid and assist the Court in determining the merits of the issues. If the Court attends these discovery proceedings and the efforts of attorney Staton lapse into something beyond his stated purpose and represent something that harasses or embarrasses members Luff or Thompson, the Court undoubtedly will give them protection. Section DR7-102(A) (1) of the new Code of Professional Responsibility in force presently in Michigan clearly would place attorney Staton in an unethical position were his efforts anything more than an effort to seek the truth and to enlarge the record of the cause with additional information designed for the benefit of the trial Court.

The Committee can well understand the misgivings of Judge Fox in relation to a situation which presents rather unusual

problems of past and present relationship of counsel for the the Board of Education and the rather unusual practice of discovery against members of its Board.

We are of the opinion that to convince the Court of his good intentions attorney Staton in his Summary of Exhibit "G" and in his colloquy with the Court has expressed what he conceives to be substantial reasons why Board members Luff and Thompson should be so discovered. The relevancy of such an inquiry as well as the purpose and intentions of attorney Staton are within the discretion and control of the Court when related depositions are later used. It is to be noted that without objection of Plaintiffs' counsel depositions have been taken of certain former members of the Board and of the remainder of its present members.

We wish to remind you again, as stated in the outset of our comments, that we are here presenting an informal opinion of the Committee, although it carries with it majority approval of all members of the Committee with one exception. Copies of the proposed opinion have been sent in advance to the members of the Committee for their comments. One of our members is of the opinion that we should not by implication believe that your law office did not pass judgment on the merits of the May 7 plan and he accordingly says that advice as to the right of postponement of the May 7 plan is enough like nullification as to put your firm in a position of now advocating the opposite of what you advocated in the previous lawsuit in relation to your advisory services to the Board concerning the May 7 plan. You are reminded that on your request or the request of other interested parties the Committee will prepare, based upon the general contents of this informal opinion, a formal opinion for your benefit as to the issues here involved. There will be a considerable delay in the rendition of such a formal opinion because of the need of its approval, under our rules, by the Commissioners of the State Bar of Michigan.

You are also reminded that Mr. Theodore Swift, Chairman of our Committee, has entered an appearance in this proceeding as of counsel for the plaintiffs. Accordingly, he has disqualified himself and has taken no part in our arriving at the informal opinion here presented to you.

We have concluded, however, that within the limitations stated, and dealt with by the disciplinary controls of our new Code of Responsibility, attorney Staton has his right to pursue such inquiry by discovery. Nothing is here intended to influence the judgment of the trial Judge in relation to the merits of the case when it is tried. This Committee is usually very reluctant to pass opinions on ethical conduct pendente lite for fear that some part of an opinion of such a nature might be used on arguments as to the merits of the issues involved. Fortunately, we are dealing here by common consent with merely a matter of the right of continuing representation by the Staton (Ford) law firm. As to such we are of the opinion that it is proper and ethical for this firm to continue in the litigation in representation of the Kalamazoo Board of Education. In fact, if Mr. Staton all in good faith uses the related Court Rules and the other discovery rights which he has along with the very considerable background knowledge of his firm as to such Board problems he has an opportunity as a lawyer doing public service to greatly assist in building a full record and in fully informing the Court as to the issues involved.

Yours very truly,

/s/ GLENN M. COULTER
Glenn M. Coulter

GMC/ss
Encls.
cc: Honorable Noel P. Fox
Richard Enslen
Philip Hummer
Nathaniel R. Jones
Louis Lucas
Members of the Committee

Docket No. 122

UNITED STATES OF AMERICA
IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHELLE OLIVER, by her father and next friend, ROBERT JONES; DAWN KIRK, STEPHEN KIRK and KIMBERLY KIRK, by their father and next friend, WYATT KIRK, LEAH ROBIN and PAUL ROBIN, by their father and next friend, STANLEY ROBIN, TIMOTHY SMITH, by his mother and next friend, KAREN MILLER, SCOTT ODOM, by his mother and next friend, SUE ODOM, LISA MILLER, by her mother and next friend, MARGARET MILLER, STEPHEN PULASKI, LEAH PULASKI and MARK PULASKI, by their mother and Next Friend, EDITH PULASKI, JOHN FLYNN, DR. DONALD MAY and JOAN VAN ZOEREN, Parents, are all parents or minor children thereof attending schools in the Kalamazoo Public School System, THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, KALAMAZOO BRANCH,

Plaintiffs,

v.

KALAMAZOO BOARD OF EDUCATION, a body corporate, EDWARD P. THOMPSON, ANDREW C. LUFF, A. T. LUEY, JACK HOEKSTRA, DR. DALE PATTISON, NORMAN BRUEX, ALLAN TYLER, members of the BOARD OF EDUCATION OF THE CITY OF KALAMAZOO, REED HAGEN, Acting Superintendent of the Kalamazoo Public Schools, MICHIGAN STATE BOARD OF EDUCATION, a Constitutional Body Corporate, JOHN W. PORTER, Acting Superintendent of Public Instruction, et al.,

Defendants.

K-88-71 C.A.

This school desegregation class action, brought by school children of Kalamazoo, Michigan, their parents and the National Association for the Advancement of Colored People, was filed on August 12, 1971. Party defendants include the Kalamazoo Board of Education, each of its members, the Superintendent of Schools in Kalamazoo, the Michigan State Board of Education and the Michigan Superintendent of Public Instruction. The Kalamazoo City Education Association has intervened as a party plaintiff.

In the year during which this action has been pending, the court has conducted two extensive evidenciary hearings, rendered three formal written decisions, supervised the kind of complex discovery procedures which a case of this nature demands and issued innumerable informal rulings. In order to discharge these responsibilities, the court has necessarily brought to bear its past experience onthe state and federal trial bench, its past as well as current exposure to legal issues such as those posed by the instant case, its understanding and evaluation of the arguments of counsel and its assessment of the controlling facts in this case as they have been revealed throughout these comprehensive proceedings.

Presently before the court are the affidavit, motion and brief of the Kalamazoo Board of Education seeking displacement of the judge under the provisions of Title 28, United States Code, Section 144. Several grounds are advanced purporting to establish that the court is and has been personally biased and prejudiced in favor of plaintiffs and against the defendant board of education.

The cited statute which controls defendant's motion reads as follows:

> "Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> "The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less

> than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith."

In this case, the required certificate of good faith has been filed, and the court is prepared to act on the assumption that the affidavit has been timely filed. For purposes of the motion to recuse, all facts asserted in the affidavit must be taken as true. *Berger* v. *United States*, 255 U.S. 22 (1921); *U.S.* v. *Tropiano*, 418 F.2d 1069 (2nd Cir. 1969); *Peacock Records Inc.* v. *Checker Records, Inc.*, 430 F.2d 85 (7th Cir. 1970). Therefore, the sole issue before the court is whether the facts and reasons alleged are legally sufficient to establish bias or prejudice within the meaning of the statute.

In performing the review for sufficiency mandated by the statute, a court must test the affidavit against the standard laid down by the Supreme Court in *Berger* v. *United States, supra:*

> "The reasons and facts for the belief the litigant entertains are an essential part of the affidavit, and must give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment." (At pages 33-34.)

Cast in the light of this standard, the defendant board's affidavit in this case is plainly deficient.

Although quite lengthy, the affidavit presently before the court is wholly conclusory and argumentative and, thereby, inconsistent with the statutory concept. It raises numerous matters purporting to establish prejudice but uniformly stresses the impropriety of judicial rulings or judgments as to legal issues as basis for the motion to recuse. Such assertions fail to establish the *personal* bias or prejudice required by the statute. The fundamental principle which controls the disposition of defendant's motion was articulated long ago by the Supreme Court when it ruled that "the bias or prejudice which can be urged against a judge must be based upon something other than rulings in the case." *Berger* v. *United States*, supra, at 31. Nevertheless, defendant's affidavit here

focuses entirely upon judicial rulings with which it takes exception. Consequently, the court is confronted with a situation similar in kind to that faced by the Tenth Circuit Court of Appeals in *Palmer* v. *United States*, 249 F. 2d 8, 9 (1957):

> "The allegations contained in petitioner's affidavit are but complaint of adverse rulings made by the court and subjective conclusions as to the court's motives and manner in conducting the trial and subsequent proceedings. Such claims do not meet the requirements of 28 U.S.C.A. § 144."

The Sixth Circuit Court of Appeals has also recognized the essential requirement that prejudice of a personal nature for or against a party must be established with reference to facts other than the presiding judge's expressed view of the applicable law.

> "The bias or prejudice which will disqualify a judge must be 'personal bias or prejudice as distinguished from a judicial one. (Citations omitted.) It is not sufficient if the alleged bias or prejudice arises out of the judge's background and associations rather than his appraisal of the complaining party personally. (Citations omitted.) Nor is it sufficient that the alleged bias or prejudice arises from the judge's view of the law, which may have been expressed by him in some prior case. (Citations omitted.) * * *"

> "Adverse rulings during the course of the proceedings are not by themselves sufficient to establish bias and prejudice." *Knapp* v. *Kinsey*, 232 F.2d 458, 466 (6th Cir. 1956).

More recent decisions have only reemphasized the point under discussion. In order to be disqualified, a judge must be accused of bias and prejudice arising from an extrajudicial source, meaning a source apart from the legal arena. *Plaquemines Parish School Board* v. *United States*, 415 F.2d 817, 825 (5th Cir. 1969); *Bradley* v. *School Board of the City of Richmond, Virginia*, 324 F.Supp. 439 (1971); *United States* v. *Amick*, 439 F.2d 351, 369 (7th Cir. 1971). Defendant's affidavit suffers the same defect recognized by the Court of Appeals for the District of Columbia Circuit in *Tynan* v. *United States*, 376 F.2d 761 (1967), at page 765:

> "Reviewing the appellants' affidavits, we note again that they allege as factual basis for charges of prejudice only acts and conduct occurring in the courtroom during the trial of the present case or in relation to the court's official action in ruling upon issues and questions of conduct which were a part of the court proceedings in this case. * * *
>
> "It is perfectly obvious that of the asserted bias of Judge Sirica, none originated in any extrajudicial source, consequently we affirm the judge's action in refusing to recuse himself in these proceedings."

Defendant argues in its brief accompanying its affidavit of prejudice that when the courts speak of "extrajudicial source," they mean to say that any judicial predisposition which is prompted by something other than evidence of record in the subject case constitutes disqualifying prejudice. This argument is entirely untenable. A judge has both the right and the duty to apply to questions of law before him his past experience, research and deliberation. It is only if a judge draws upon nonjudicial sources to formulate a personal bias for or against any litigant which will affect his resolution of the merits of issues before him that disqualifying prejudice is established. What defendant classifies as prejudice not stemming from an extrajudicial source is really no form of prejudice at all. Surely, any rulings made on the basis of evidence before the court cannot imply prejudice or bias, since, by definition, no prejudgment is then involved. The point universally recognized by the courts and overlooked by the defendant board is that even some kinds of prejudgment are outside the coverage of the statute. Specifically, a judge's pre-existing view of the law applicable to a party's cause cannot be the basis of a disqualifying prejudice. The simple concept involved, as recognized by the Supreme Court in Berger, supra, is that any erroneous applications of the law may be cured on appeal, regardless of their source; whereas an unfair adjudication of the factual merits of a party's position may not be so easily remedied.

Turning to the specific allegations of the affidavit filed by the Kalamazoo Board of Education, it is plain that they fail to establish, either separately or jointly, grounds for disqualifying bias or prejudice. The first allegation, designated "A", is that judicial

comments of record indicate that the judge "holds an unshakable conviction (that) there is no difference or distinction of substance between the purposeful and intentional segregation of schools on the basis of race by a state or its agencies (de jure segregation) and the unintended, unplanned and unwanted racial imbalance which occurs without the action of the state or its agencies (de facto segregation)." Defendant asserts that this conviction was held by the judge at the very beginning of the instant lawsuit.

Even assuming, but not admitting, that the record supports defendant's asserted conclusion, obviously no personal bias is thereby demonstrated. In its ruling on plaintiffs' motion for preliminary injunction the court definitely voiced the conviction that regardless of the original cause, when schools are permitted to persistently reflect racially separated student populations, the detrimental effect upon the pupils, especially the black pupils, is the same. That equal educational opportunities, and, hence, equal protection of the law is just as effectively denied by the state when it permits racial segregation to exist by inaction as when it purposely imposes such segregation *is a concept of law and constitutional interpretation. Regardless of its legal merit, it is uncontradictably a legal position readily susceptible of orderly review on appeal and not an example of the kind of personal prejudice of which 28 USC §144 speaks.* The court has frequently expressed its openness to the legal arguments of counsel as to the proper significance of factual circumstances peculiar to this case. The court's ultimate ruling in this action may or may not include findings of de jure and/or de facto segregation in the Kalamazoo school system, but the legal significance of such findings will be determined by the court's judgment as to the applicable law. That this judgment will have many roots which predated the filing of this action is as probable as it is irrelevant to the question of personal bias under the statute.

Defendant's second allegation ("B") is that the court's order granting preliminary injunctive relief unduly favored blacks over "poor whites" and thereby exhibited partiality towards black plaintiffs. The court notes, first, that the plaintiff class and group of named class representatives include white as well as black individuals. The obvious primary deficiency of defendant's allegation in this respect, however, is that the race issue is the fundamental and

sole broad issue posed by the pleadings in this case. It was not raised or singled out by the court sua sponte but was and is the singular thrust of plaintiffs' complaint. The court was never called upon by any party to resolve any constitutional or other questions with respect to "poor whites" or any other group. It was only at the pretrial proceedings of May 1, 1972 that defendant first raised any question pertaining to "poor whites." The court immediately responded as follows:

> "This is the first time I have ever heard of any claimed consequences of the plan affecting poor whites. This is the very first time it has ever been mentioned in this court, and I am interested . . . ."

Defense counsel thereafter made no effort to contest the fact that no issue relating to poor whites had ever before been raised. The court then pursued the point by stating:

> "This court has been open at all times to any plan, any modification of the plan. And the Sixth Circuit Court of Appeals has put it in its order that this court has the power to modify the plan, and I haven't seen any plan complaining about the problem that has just been announced."
>
> "And if there is any such plan of that kind, any such basic problems in any area that can be modified promptly by action of this court, this court stands ready to hear it."
>
> * * *
>
> "The court will make room for any emergency situation on its calendar, as it demonstrated that it can do, and does. And we have worked many times until midnight and after in cases of emergency."

In view of these remarks, it is especially clear that the court has denied to no group or cause the opportunity to be heard as to possible adjustment of present operations. In this context, the court also notes that these present operations are guided by an order of this court which draws its entire administrative substance from a plan of attendance boundaries studied, designed and adopted by the Kalamazoo Board of Education. The plan ordered

by the court was in no measure formulated or conceived by the court but was, rather, totally the product of the decision-making of the defendant-affiant school board, based on several years of prior study and research.

The fourth specification of prejudice, identified as "C-1" in the affidavit, hinges on the court's comment, during its ruling on plaintiffs' motion for preliminary injunction, that:

> "This court finds, as a matter of fact and law, that it was not precipitous, that it was a very careful, deliberate, fully-considered plan by conscientious, sincere, publicly dedicated, self-sacrificing men who had the courage to 'bite' the bullet."

The board asserts that since the character qualities of the men who voted approval for the school attendance plan under discussion was not at issue, the quoted observations establish judicial bias and prejudice. This court must find, however, that these few words, uttered late in the evening after over twelve hours of testimony and legal argument, cannot establish bias, even if the comment was inappropriate or unnecessary. This incidental characterization of these individuals (who happen to be parties defendant in some cases and parties plaintiff in no case) was quite insignificant to any issue of substance past or present and was, in the judgment of this court, fully and fairly supported by the evidenciary record.

The affidavit, in part "C-2," similarly challenges the court's observation of the same day, during the same ruling, with reference to Dr. John Cochran, then Superintendent of the Kalamazoo Schools. Defendant board argues that the court's acceptance of the proposition that Dr. Cochran was dismissed because of his involvement in the preparation of the school integration plan demonstrates the court's prejudice. This assertion also suffers the defect of insufficiency. At the time the rulings here raised were made, Dr. Cochran was a named defendant, not plaintiff. The court's reaction to the circumstances of his dismissal was prompted by testimony revealing the circumstances of that dismissal as coincidental to the board action of July 6, 1971 rescinding the school integration plan. The behavior and motives of the board on that occasion were directly in issue. The court's judg-

ment, therefore, however sound, was a part of its judicial disposition of the legal motion before it, arising from evidence of record. Surely, no conclusion of personal bias in favor of plaintiffs or against the defendant board is fairly supported by the court's expression of that judgment.

The defendant board next alleges, in point "C-3" of its affidavit, that the judge's prejudice against it is demonstrated by the fact that the court, in its ruling on the motion for preliminary injunction, made an erroneous ruling of fact and law with reference to the nature and correctness of certain legal advice given the board by its attorney, Mr. Ford. Once again, the affidavit which is required by statute to state facts and reasons for an inference of personal prejudice assumes far more nearly the form of an appellate brief. *The numerous cases cited supra unanimously recite the fundamental principle that adverse rulings alone may not support a conclusion of statutorily disqualifying prejudice.* This means, simply, that a party may not prevail on a motion *to recuse by merely asserting that a ruling was so erroneous it could only spring from personal bias.* The subject of part "C-3" of the affidavit is no bizzarre example of impropriety. Without belaboring the entire merits of the court's ruling with respect to this issue, it should be noted merely that this ruling was predicated on considerations of Michigan constitutional and administrative law as it bore on the authority of the Michigan Board of Education and the Michigan Civil Rights Commission with reference not only to the Commission directive with respect to construction of housing but also to the joint policy statement of the Commission and the State Board of Education (quoted in the court's opinion) relative to school integration.

The allegation of the affidavit represents a misleading portrayal of the court's comment, but, again, such an allegation, even if it is presumed to be accurate, utterly fails to satisfy statutory requirements because it fails to speak to the issue of personal prejudice.

Designated as point "C-4" of the board's affidavit is a lengthy allegation that the court's handling of a Motion For Protective Order filed by plaintiffs on April 3, 1971 was solegally unjustifiable as to warrant only an inference of personal bias and pre-

judice. *Once again, the concept that judicial prejudice may be established by recitation of a very erroneous adverse ruling is offered by the affiant.* Once again, the court must observe that such an approach to the factual issue of bias fails to comply with 28 USC § 144, as that statute has been consistently interpreted by the federal courts.

Since the factual circumstances which give rise to this portion of the affidavit are somewhat involved, a brief summary will be necessary. As a part of the extensive pretrial discovery procedures required by this complex lawsuit, the parties have participated in several discovery depositions of local and state school officials, as well as others. As a part of this process, the defendant Kalamazoo Board of Education noticed and, without objection from plaintiffs, took the depositions of two individuals who were board members who had supported the school integration plan of May 7, 1971, and opposed the resolution nullifying that plan on July 6, 1971. When counsel for the board noticed the depositions of two other such individuals, however, plaintiffs filed a Motion for Protective Order, alleging that past experience justified their fear of harassment as the noticed deposition sessions. The court entertained arguments on this motion at a pretrial conference on May 1, 1972. The transcript of that conference reveals that plaintiffs argued that the earlier depositions of past and present board members had featured considerable personal friction between counsel for the board and the witnesses. Plaintiffs further contended that this friction was very largely due to the unreasonable hostility of counsel for the board and the witnesses' resentment of the manner of questioning. Plaintiffs' counsel questioned the real utility of further depositions in eliciting information not already available to counsel for the board. In this connection, the past representation experience of defense counsel was recited.

> "MR. HUMMER: We raised an objection to the taking of the deposition of Mr. Thompson and Dr. Luff, and I think that our experience on the other examinations gives more substance to our concern. Mr. Staton's firm has represented the school board for a great many of years and was its counsel at the time of the adoption of the racial balance plan. And if you will also recall, prior to the institution of this action, an action was instituted in the state court, Circuit Court of

> Kalamazoo, to enjoin the Board from adopting the May 7th Plan. Mr. Staton's firm represented the board in that action. It is our feeling, your Honor, that the defendants have had ample opportunity to explore the position of the proponents of the racial balance committee. Furthermore, that they have had ample opportunity to explore the – and develop the facts with regard to the creation and development of a plan on the examinations of the opposition to the plan. So that we are seriously questioning whether this is a – these are depositions that are properly for discovery purposes. . . .
>
> The depositions got pretty hot and heavy. . . .
>
> I think the record will show that there was a great deal of friction between Mr. Staton and the witnesses."

Following plaintiffs' argument, defense counsel responded to the effect that the depositions were necessary to adequately prepare his case and that no undue hostility had been exhibited at past depositions. Following this argument, the court first expressed its concern that the past representation activities of defense counsel might be inappropriately contributing to the tensions at the depositions of past and present school board members. It was in this context that the court stated:

> "This is what kind of bothers me, how your firm can continue to represent the school board when the school board drafted and participated in the activities for preparing the plan that is now in question, and now you are representing the school board that is questioning the plan that was worked out when your firm was their lawyer. . . .
>
> It raises a question in my mind why you should be cross-examining the persons that you represented as attorney."

It is this expressed concern of the court which the affidavit raises as evidence of the court's prejudice.

As the record clearly reflects, the court's concern about the possible impact on this case of defense counsel's past representation of the school board entirely and naturally grew out of the issues raised by the Motion for Protective Order. The difficulties

posed by the prospects of an attorney pressing a demanding cross-examination against individuals who had only months earlier looked to him for advice and guidance was or should have been apparent to everyone present. The court at no time expressed or suggested a definite opinion on the matter at the time. Every comment was prefaced by such words as "it kind of bothers me," "a question is raised in my mind," and "this is what is troublesome to me." At the conclusion of the conference, the parties were asked to brief the legal implications of the situation. None of this suggests prejudgment; all of this relates merely to legal questions of practice and procedure raised by the pleadings and arguments of the parties. It is a fact that in the process of initially reacting to questions raised by the Motion for Protective Order, the court did also express concern for the larger ramifications of defense counsel's past representation of the school board as it might affect the propriety of any further activity in the instant case. In its ultimate ruling of July 13, 1972, however, the court laid such issues to rest by ruling that it found no reason to believe that further participation in this litigation by the firm of Ford, Kriekard, Staton and Allen would be inappropriate. The court did rule, upon full consideration of the circumstances and applicable law, that outside attorneys should conduct the contested depositions. *None of these legal rulings support any inference of personal bias or prejudice on the part of the court.*

The final section of the affidavit, "C-5," alleges very succinctly that the trial judge's prejudice is revealed by an alleged undue delay in the trial of this case on the merits. Of course, the characterization of the time interval involved as "undue delay" is conclusory. The fact which must be the basis of the charge of prejudice is the time interval itself.

That trial on the merits has been unduly delayed is not at all fairly supported by the circumstances and the record in this case. The court has from the outset preserved for this case top calendar priority among the several hundred cases currently pending before it. It is true that the court originally hoped for a trial in October of 1971. The record plainly reveals, however, what all parties to this lawsuit know: that a financial crisis in the Kalamazoo schools during the fall of 1971 triggered extensive diversion of the atten-

tions of school administrators, school boards, the court and even the state legislature in search of funds and the proper manner to expend available resources. Pretrial preparation of the factual and legal issues originally contested was necessarily deferred. When the parties were once again able, in January of 1972, to turn to trial preparation, they all increasingly gained for the first time a realistic awareness of the immense practical difficulties which obstructed a hasty trial. Counsel for all parties immediately launched into a commendable effort, which had already started as early as November 1971, to cull all the relevant data and prepare intelligently for a full and fair trial of the highly important public issues posed by this case.

On May 1, 1972, following extensive pretrial discovery work and more pretrials, the court called together all parties in the sincere and earnest hope that a trial date might be set in the immediately foreseeable future. To the court's dismay, however, the attorneys indicated that substantial discovery procedures still lay ahead, although every effort at diligence was being made. Counsel for the state defendants, particularly, was having difficulty responding promptly to certain important written interrogatories, among other reasons because of the heavy burdens placed upon the Attorney General's office by a Michigan Supreme Court deadline in a case challenging the constitutionality of funding public education with local property taxes and by the school integration case in Detroit. The court responded as follows:

> "Well, the case is important enough that all the relevant facts should be presented to the court and all the evidence that is essential to a decision of the case on the merits with a just result. It must be accomplished. Segregation cases are burdensome, and they are substantially involved. Many, many facets seem to channel, cascade or current into a focal point that may bear on the proposition. Of course, I don't want to cut anyone off from presenting to the court relevant and pertinent testimony, *but I do want to get it in triable shape and do want to do this as expeditiously as possible.*" (Emphasis supplied.) (Transcript May 1, 1972 pretrial, page 61.)

In immediate response to these comments by the court, attorney Staton, speaking for the school board, recited several items of dis-

covery which he still wished to explore, including interrogatories, depositions and preparation of experts. Plaintiffs expressed similar desires. In view of all these apparent indefinite factors, including the fact that counsel for the board could not as yet even identify definitely the experts it would call, the court decided that it could not set a firm trial date. In response to Mr. Staton's question about a trial date the court noted, and Mr. Staton accepted, the point that a February 1972 trial date was originally planned by the court and was rendered unrealistic through no fault of the court.

The parties thereafter, primarily through Mr. Staton as their spokesman, outlined a prospective discovery schedule for wrapping up all necessary interrogatories, depositions and preparation of experts. The schedule culminated in a targeted November 1 trial date. The court then responded as follows:

> "I will do the best I can to see if we can make it *much* sooner; but if this is what we have to do –
>
> Well, we will do the best – if this is the schedule you want to set up now, I will go along with it, and I will try to help and cooperate in any way to advance it and expedite the total discovery . . . apparently (these cases) are more involved than one thinks at first blush . . . you just don't turn these things on and off . . . . I will try to have it as soon as possible . . . ." (Emphasis supplied.) (Transcript May 1, 1972 pretrial, pages 94-95.

The court then indicated it would attempt to keep a block of time available flexibly on its calendar for the trial of this case, to the extent possible, as it had previously done in February. When Mr. Staton expressed his opinion that the case might be tried by June 15, the court responded:

> "I am going to keep on top of it and see that it goes along and progresses to a trial, and I am going to see to it that it is a full trial." (Transcript, page 120.)

The court then stated that the schedule suggested by the parties should be the target. The court further ordered:

> "You outline your program's necessities and I am going to call meetings from time to time to see how well you are progressing, and try to set it definitely, as a target, the trial, no later than November, but it will be explored for time to time." (Transcript, page 121.)

Despite the court's active encouragement of speedy preparation of this case, obstacles beyond the court's power to control have regrettably intervened to impede progress. With so many parties and numerous attorneys from all over the country involved, perhaps such obstacles were and are inevitable. In any event, this court has never slackened its effort or desire to bring this important case to a final adjudication. It has received the court's very special attention during the past year. The fact that has necessitated a delay no one welcomes is that the effort to coordinate the schedules of all concerned and to research the vast factual background relevant to this case is simply vast. As recently as July 25, 1972 the court was forced to postpone a pretrial at the request of counsel for the state defendants, with the concurrence of the counsel for the Kalamazoo board. The conclusion that the court's prejudice or bias is in some way responsible for delaying the resolution of this burdensome case is wholly without foundation in the record or the affidavit based thereon.

In determining the sufficiency of an affidavit of prejudice, a judge must face not only the duty to step aside if the alleged facts establish the requisite bias but also a simultaneous duty to refuse to recuse himself in the event the affidavit fails to satisfy statutory requirements. *Tynan* v. *United States* (D.C. Cir. 1967), *supra; United States* v. *Tropiano* (2nd Cir. 1969), *supra; Action Realty Co.* v. *Will,* 427 F.2d 843 (7th Cir. 1970); *Benedict* v. *Seiberling,* 17 F.2d 831 (1926). For the court to step aside in this case on the basis of the affidavit filed by the Kalamazoo Board of Education would be not only unnecessary but also improper. For the reasons stated above, this affidavit completely fails to establish grounds which even begin to give fair support to a conclusion that a personal bias or prejudice for plaintiffs or against the defendant-affiant board has been demonstrated. As indicated previously, the

affidavit resembles in most respects an appellate brief. Consequently, the law provides that defendant's remedy properly lies in an ultimate appeal on the merits of the court's rulings. The motion to recuse must be and is hereby denied.

IT IS SO ORDERED.

Dated: August 9, 1972.

/s/ NOEL P. FOX
Chief District Judge

Filed August 21, 1972
Docket No. 123

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION** (No Notice)

MICHELLE OLIVER, et al, *Plaintiffs,* vs. **KALAMAZOO BOARD OF EDUCATION, et al,** *Defendants.*	**No. K 88-71** **Motion to Dissolve Preliminary Injunction**

Defendant Kalamazoo Board of Education respectfully moves the Court for an order dissolving its preliminary injunctive order in this cause and as modified; that this motion is made on the following grounds and for the following reasons:

1. That there is a material change in circumstances now existing and existing at the time the injunction was granted and modified; that more particularly in granting and modifying the preliminary injunction this Honorable Court assumed a prompt trial on the merits of this cause would be had, and the preliminary injunctive order was affirmed by the Court of Appeals on the assumption a prompt plenary hearing on the merits was already scheduled and would be had; that a prompt hearing on the merits of this cause as scheduled at the time the injunctive order was entered and affirmed was a material circumstance and consideration in the granting and affirmance of said order; that events have since shown the parties, and most specifically this Defendant, has not had and cannot obtain a prompt hearing on the merits of this cause, either because of the failure or refusal of the Honorable Noel P. Fox to take such steps as will bring about such a prompt hearing, or because of his admitted inability, in view of all facts and circumstances, to provide same; that it is grossly inequitable to provide Plaintiffs the principal relief sought; to do so for a long and indefinitely protracted period while Defendant has not had and cannot obtain a hearing on the merits necessary to determine whether or not Plaintiffs are entitled to any relief at all.

2. Section 803 of the Educational Amendments of 1972, Public Law No. 92-318 requires the effectiveness of the preliminary injunctive orders entered in this cause and as modified to be postponed until all appeals have been either exhausted or until the time for such appeals has expired.

3. That the preliminary injunctive order entered and as modified was made by the Honorable Noel P. Fox as the presiding Judge and that the Honorable Noel P. Fox has and has had during the entire course of this litigation such a deep and overpowering personal bias and prejudice against this Defendant and in favor of Plaintiffs, and particularly black Plaintiffs, Defendant Kalamazoo Board of Education has been deprived of its fundamental right to a fair and impartial judge in this proceeding; that the deprivation of this fundamental right to a fair trial has deprived it of due process under the law and requires dissolution of the said injunctive order as modified.

This motion is based upon the records and documents filed in this proceeding, and specifically the affidavit of the Kalamazoo Board of Education filed to obtain the recusal of the Honorable Noel P. Fox, which said affidavit is offered in support of this motion as fully and completely as though it were attached hereto and refiled solely in support thereof. Defendant further moves this Court to give all possible priority and precedence to the hearing and determination of this motion.

FORD, KRIEKARD, STATON AND ALLEN

By: /s/ ARTHUR STATON, JR.
Arthur Staton, Jr.
Attorneys for Defendant
Kalamazoo Board of Education

Business Address:
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Kalamazoo, Michigan 49006

DATED: August 18, 1972.

Filed December 4, 1972
Docket No. 164

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

MICHELLE OLIVER, et al, ***Plaintiffs,*** **vs.** **KALAMAZOO BOARD OF EDUCATION, et al,** ***Defendants.***	**No. K 88-71** **Motion Requesting Ruling On Motion To Dissolve And Staying Trial Date**

Defendant, Kalamazoo Board of Education, hereinafter called "Defendant Board" for convenience, respectfully moves this Honorable Court to:

1. Immediately determine and rule upon Defendant Board's pending motion to dissolve preliminary injunction.

2. Adjourn and stay the trial date for the trial of the merits of this case pending its ruling and any interlocutory appeals taken therefrom.

3. To clarify its ruling from the Bench on Plaintiffs' motion for protective order so as to remove any doubt as to its appealability as an interlocutory order denying the Defendant Board of its right to depose Dr. Andrew Luff and Mr. Edward Thompson by the Ford Firm.

This motion is made and based on the following grounds and reasons:

1. Defendant Board's motion to dissolve injunction was filed on or about August 18, 1972; that a notice of hearing to be set by the Court was filed on the same date; that the motion itself requested the Court to give its determination all possible priority and precedence.

2. That on or about August 25, 1972, Plaintiffs addressed a letter to the Court advising, among other things, their position concerning Section 803 would raise a constitutional issue and thus

require the Court to certify such fact to the Attorney General under requirements of 28 U. S. C., Sec. 2403; that the specific object and purpose of Plaintiffs' August 25th letter was to call these certification requirements to the Court's attention and thus avoid delay on the determination of Defendant Board's motion to dissolve that might otherwise occur were the requirements of certification not thus called to attention; that a copy of Plaintiffs' August 25th letter is attached hereto and identified as *Exhibit "A"*.

3. That *Exhibit "A"* notwithstanding, no such certification was made by the Court, and on September 13, 1972 a pre-trial hearing was held, during the course of which the need for such certification was again called to the Court's attention. What was said at said pre-trial is as appears at Pages 25 and 26 of the partial transcript of said hearing, the applicable part of which is attached hereto as *Exhibit "B"*.

4. That the required certification was not made by the Court, and on October 16, 1972 in a Court-requested written progress report to the Court, Defendant Board again called the Court's attention to the certification requirements of 28 U. S. C., Sec. 2403, and on October 17, 1972 the required certification to the Attorney General was made, giving the Attorney General 30 days from October 17, 1972 to intervene or otherwise appear; that the determination of Defendant Board's motion to dissolve has been delayed by virtue of the foregoing delay in certification.

5. That on November 17, 1972, the last date for the intervention or appearance of the Attorney General passed without such intervention or appearance having been made, and on November 17, 1972 Plaintiffs filed their final supplemental brief, the deadline for such filing having been extended so as to terminate no later than the date given the Attorney General in the Court's certification.

6. That in its original notice and motion and in all subsequent pre-trials Defendant Board has emphasized the importance of an early determination of its motion to dissolve and has exerted every effort to bring its motion to dissolve to a rapid determination. Defendant Board's efforts in the September 13th pre-trial

appear at Pages 22 through 26 and at Pages 33 through 37 of the partial transcript of said pre-trial and are attached hereto as *Exhibit "C" and "D"* respectively; its efforts as made in the October 16th progress report are set forth in a copy of the applicable portion thereof attached hereto as *Exhibit "E"*; and its efforts is made in the November 7, 1972 pre-trial are set forth at Pages 74 through 79 of the partial transcript of said pre-trial, copies of which are attached hereto as *Exhibit "F"*.

7. That the motion to dissolve involves, under present circumstances, primarily, if not solely, questions of law, and is ready for determination by the Court.

8. That a ruling upon the motion to dissolve is subject to interlocutory appeal as a matter of right and an interlocutory appeal of this ruling would also permit interlocutory appellate review of two prior orders of this Court, each of which directly affects and denies Defendant Board's right to a fair trial; that the first is the Order of this Court denying the Ford Firm the right to depose Dr. Andrew Luff and Mr. Edward Thompson, and, on identical principle, all past Board members, in advance of trial. Under this Order the Defendant Board is denied its right to have important and possibly controlling aspects of this litigation handled by the attorneys of its choice. Under this Order the Defendant Board's counsel, the Ford Firm, is denied the right to serve its client in important and possibly controlling areas of this litigation; that no attorney can accept nor continue to represent a client under such a limitation. This Order, if not reversed, ethically compels the Ford Firm to withdraw from this litigation and deprive Defendant Board totally of its right to counsel of its choice, though the Ford Firm's handling of the Luff-Thompson depositions is not unethical as has been determined by the appropriate committee of the Michigan State Bar. The second is the Order of this Honorable Court refusing to recuse itself and designate an alternate Judge to hear the merits of this case, and that this Order, unless reversed, will deprive Defendant Board of its right to a trial of its cause before a fair and impartial Judge without personal bias and prejudice against it and for all or some of Plaintiffs.

9. That were the merits of this case to be tried in February

but reversed and remanded for retrial on appeal because of the pre-trial errors described in Paragraph 8, the parties would be placed to great and unnecessary hardship and expense and the ultimate determination of this litigation greatly prolonged and delayed.

10. That interlocutory appeal need stay no proceedings below except actual trial, and pending appeal the parties can complete all essential discovery except that in issue in the appeal, and the case can be readied for prompt trial upon determination of the interlocutory appeal.

11. That this Honorable Court has ordered the parties to explore every possibility of settlement by some kind of compromise plan mutually acceptable to the parties; that the parties have in good faith, though without substantial progress, attempted compliance with the Court's order; that the Defendant Board and its committees have developed an alternative plan or plans which, or some variation of which, may be acceptable both to a majority of the Defendant Board and the Plaintiffs; that progress in this connection is halted pending preparation of a pupil locater map, and the preparation of that map likewise is delayed pending computerized development of pertinent racial data by grade, census, tract and block; that such data and such map may not be available for settlement exploration before trial on the merits is scheduled in February, but will or reasonably should be available during the pendency of any interlocutory appeal, and the possibility of settlement will be greatly enhanced if explored in depth after the map is prepared and available to the parties, and that this can be done during the pendency of interlocutory appeal.

12. That any delay in the progress of this litigation is most prejudicial to Defendant Board and it has directed all of its efforts toward avoidance of delay; that in submitting this motion it acts not to delay but to avoid the delay in ultimate progress of this litigation, and it acts out of absolute necessity to obtain even more paramount and fundamental ends, i. e., a fair trial on the charge it has, in violation of the Federal Constitution, intentionally segregated its school children on the basis of race and has provided its black students unequal educational opportunity.

This motion is based upon the Affidavit of Arthur Staton, Jr. and the papers and documents filed in this cause.

FORD, KRIEKARD, STATON AND ALLEN

By: /s/ ARTHUR STATON, JR.

Arthur Staton, Jr.
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DATED: December 1, 1972.

Filed December 21, 1972
Docket No. 179

UNITED STATES OF AMERICA
IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHELLE OLIVER, et al., *Plaintiffs,* v. **KALAMAZOO BOARD OF EDUCATION, et al.,** *Defendants.*	**K-88-71 C.A.** **ORDER**

This school desegregation class action was filed with this court on August 12, 1971. On August 19, and 20, 1971 an extensive evidenciary hearing was conducted on plaintiffs' motion for a preliminary injunction. An injunction was thereafter granted and continues in effect at present. Before the court at this time are defendant Kalamazoo Board of Education's motions to dissolve that injunction and for stay of trial.

In seeking a favorable ruling, the defendant Board, as petitioner, has plainly revealed and even asserted that its prime if not sole purpose was and is to "circuitously" achieve appellate review of auxiliary rulings not otherwise subject to interlocutory appeal. The grounds advanced in support of the motion to dissolve confirm such a purpose. These grounds include no reference whatever to the kinds of changed factual circumstances or allegations of hardship which ordinarily and properly lay basis for petitions seeking modification or dissolution of preliminary injunctive orders. The points advanced as supposed grounds for dissolution raise matters previously ruled upon and entirely collateral to preliminary equitable relief. Consequently, defendant's motion to dissolve not only to be supported by sufficient merit, but in actuality, is devoid of any prima facie basis whatever.

The question of jurisprudence which emerges, therefore, is whether, by mere virtue of an appropriately styled pleading, a party may manufacture a right to interlocutory review of rulings not otherwise appealable The rulings which are the acknowledged

and asserted targets for appeal at this juncture are rulings deemed by the Congress to be insufficiently consequential to warrant disruption of the orderly progress of an action in the trial court. Is this policy, manifestly applicable in these complex and already extended proceedings, to be thwarted simply by defendant's express effort of contrivance? For its part, this court will not contribute to such digression and redundancy by delaying the firm schedule heretofore fixed to achieve a full trial of this cause on February 15, 1973.[1]

While defendant stresses the urgency of its motion to dissolve, this court finds no such immediacy with respect to the preliminary injunction at this late stage of the trial preparation effort. The original request for preliminary injunctive relief came days before the scheduled commencement of fall classes, amidst great community turmoil and confusion. The situation called for and received prompt treatment from this court as well as the courts of review. The present situation is vastly different. Classes are in session.[2] the need of the community is for a full trial and final judgment, not a revisitation of preliminary remedies and procedural rulings. See *Bradley* v. *Milliken*, 438 F.2d 945, 947.

Final, full and comprehensive trial may be had in this case within a few weeks. At that time the court should become thoroughly apprised of all relevant data and equipped to render a permanent dispositive resolution of this complex and important lawsuit. This court will therefore withhold consideration of defendants's petition for relief until trial is had on February 15, 1973.[3] In so ruling, this court is also mindful of the tremendous burden of appellate review with which the Court of Appeals must currently cope. The matters urged by the defendant simply do not warrant renewed consideration at this time.

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[1] This date is a firm and realistic one. It is the product of numerous pretrial conferences and careful study of the parties' discovery needs. Only the most compelling of reasons will be allowed to disturb the current schedule.

[2] Defense counsel have ardently and convincingly argued at the August 1971 hearing and since that disruption of attendance patterns in mid-year is highly detrimental to effective education. This court fully agrees.

[3] Such an approach is contemplated and authorized by Rule 65(a)(2).

For similar reasons, plaintiffs' motion to exercise continuing jurisdiction, although raising serious immediate issues as to possible disregard of this court's earlier injunctive order, will likewise be reserved for resolution until the time of trial. This court simply cannot and will not tolerate any further unnecessary dilution of its or the parties' resources.

This court stands ready, as always, to discharge the responsibility conferred by the Sixth Circuit Court of Appeals and by Rule 65 of the Federal Rules of Civil Procedure to consider new developments and changing factual circumstances so as to assure that its injunctive order imposes no unreasonable or unnecessary practical hardship on any party involved in this action. This court further remains resolved, however, to proceed to full trial of this case at the earliest possible date.

Defendant's request for delay is denied.

IT IS SO ORDERED.

By /s/ JACK E. FROST
Jack E. Frost

NOEL P. FOX
Chief Judge
U.S. District Court

Dated: December 21st 1972.

Filed January 5, 1973
Docket No. 202

NO. 73-1028

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SCHOOL DISTRICT OF THE CITY OF KALAMAZOO, COUNTY OF KALAMAZOO, also known as Kalamazoo Board of Education ***Petitioner*** **v.** **THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION, and THE HONORABLE NOEL P. FOX, JUDGE OF SAID COURT** ***Respondents***	**ORDER**

Before: PHILLIPS, Chief Judge, and PECK and LIVELY, Circuit Judges

This matter is before the Court on the Petition For Writ of Mandamus or Prohibition, petitioner's brief in support thereof and the exhibits thereto, and the record on appeal. Upon the filing of the petition, the respondent District Judge was in due course and in usual form advised by the clerk of this court that if he wished "to respond to the petition for writ of mandamus, the court requests that you do so within ten days." Said respondent having indicated to the office of the clerk that it is not his intention to file a response, we proceed to a consideration of the action without waiting for the ten day period to run because it is apparent that a delay in disposition would work hardship on all concerned.

While as indicated the matter before us is in the form of an original action in mandamus, it is at least in large measure in effect an appeal from interlocutory orders entered by the respondent District Judge in *Oliver, et al.* v. *Kalamazoo Board of Education, et al.*, being No. K-A8-71 on the docket of the United States Dis-

trict Court for the Western District of Michigan, Southern Division. An earlier order entered by the respondent District Judge in said action was reviewed by this Court in *Oliver, et al.* v. *School District of the City of Kalamazoo*, decided August 30, 1971, 448 F.2d 635. We therein affirmed an order granting a preliminary injunction directing the Board of Education immediately to implement a school attendance plan and remanded the cause for further proceedings.

In the present posture of this case, which brings it before us in essence as an ex parte procedure, no appearance or representations having been made by or on behalf of the respondents, we have before us in the petition, supporting brief and exhibits representations which petitioner argues establish such bias and prejudice on the part of the respondent District Judge as to cause his actions in the respondent District Court to be invalid as a matter of law. (We decline to make a determination concerning the alleged bias and prejudice in this proceeding, *which determination we conclude must be made in the appellate process when and if an appeal is perfected from a final order in the action pending in the respondent court*, leaving the determination as to the propriety of his further participation in the pending action to the discretion and conscience of the respondent District Judge.) We further decline to pass upon the issues which have arisen in connection with the depositions sought to be taken of Edward P. Thompson and Andrew C. Luff and others, the present resolution of which must remain within the discretion of the trial judge subject to review by the appellate process and similarly decline to substitute or judgment concerning the denial of the motion for an extension of the trial date. Accordingly,

IT IS ORDERED that the Petition For Writ of Mandamus or Prohibition be and it hereby is denied.

ENTERED BY ORDER OF THE COURT

/s/ JAMES A. HIGGENS
James A. Higgins
Clerk

Filed January 19, 1973
Docket No. 211

UNITED STATES OF AMERICA
IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHELLE OLIVER, et al., ***Plaintiffs,*** **v.** **KALAMAZOO BOARD OF EDUCATION, et al.,** ***Defendants.***	**K88-71 C.A.** **ORDER**

In this school desegregation action, upon motion of plaintiffs for a protective order, this court ordered, on July 26, 1972, that attorneys other than Ford, Kriekard, Staton and Allen conduct the depositions of Edward P. Thompson and Andrew C. Luff on behalf of the defendant Board of Education. The purpose of this order was to insure that a reasonable air of civility would prevail during the taking of these depositions. The court's concern was prompted by the fact that attorneys from the Ford firm had represented the Kalamazoo Board of Education for a number of years and sought to cross-examine persons who had in the recent past looked to them as counselors.

The court is satisfied at the present time that the purposes of its earlier order will be adequately served if the depositions of Mr. Luff and Mr. Thompson are conducted at the federal courthouse in Grand Rapids, Michigan and subject to ready access to the court's supervision. Accordingly, the order of July 26, 1972 is hereby modified so as to permit the defendant Kalamazoo Board of Education to designate whatever attorneys it choses to represent it at these depositions.

Since the court is currently presiding outside of this district, the parties will necessarily have to await its return before taking the depositions in question. The court presently expects to be free to return by at least February 7, 1973. Since in light of the past close relationship of the parties counsel for defendant is likely to uncover little novel information from these depositions, the court

is confident that the late date of this discovery will not necessitate postponement of the February 15, 1973 trial date heretofore fixed in this case.

IT IS SO ORDERED.

Dated: January 19, 1973

NOEL P. FOX
Chief Judge, U.S. District Court

Filed October 4, 1973
Docket No. 300

UNITED STATES OF AMERICA
IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHELLE OLIVER, by her Father and Next Friend, ROBERT JONES; DAWN KIRK, STEPHEN KIRK, and KIMBERLY KIRK, by their Father and Next Friend, WYATT KIRK; LEAH ROBIN, and PAUL ROBIN, by their Father and Next Friend, STANLEY ROBIN; TIMOTHY SMITH, by his Mother and Next Friend, KAREN MILLER; SCOTT ODOM, by his Mother and Next Friend, SUE ODOM; LISA MILLER, by her Mother and Next Friend, MARGARET MILLER; STEPHEN PULASKI, LEAH PULASKI, and MARK PULASKI, by their Mother and Next Friend, EDITH PULASKI; JOHN FLYNN, DR. DONALD MAY and JOAN VAN ZOEREN, Parents, are all parents or minor children thereof attending schools in the Kalamazoo Public School System; THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, KALAMAZOO BRANCH,

Plaintiffs,

v.

K-88-71 C.A.

KALAMAZOO BOARD OF EDUCATION, a body corporate; EDWARD P. THOMPSON, ANDREW C. LUFF, A. T. LUEY, JACK HOEKSTRA, DR. DALE PATTISON, NORMAN BRUEX, ALLAN TYLER, members of the BOARD OF EDUCATION OF THE CITY OF KALAMAZOO; REED HAGEN, Acting Superintendent of the Kalamazoo Public Schools; MICHIGAN STATE BOARD OF EDUCATION, a Constitutional Body Corporate; JOHN W. PORTER, Acting Superintendent of Public Instruction, Department of Public In-

struction, Department of Education and ex officio Chairman of Michigan State Board of Education,

Defendants.

OPINION AND ORDER

When matters of great public and constitutional significance come here for resolution, this court assumes an extra duty of care in explaining the reasons for its decision. As always, the court states the factual basis and the legal standards on which its conclusion rests so that the appellate court will know the legal grounds for this court's decision. Equally important, however, this court assumes also an affirmative obligation to attempt to educate the public concerning the basic principles underlying our constitutional democracy and the practical application of these principles in our public affairs. Since the present school desegregation case is of such importance to the people of Kalamazoo and the State of Michigan, this court has gone to great lengths to detail the facts and explain the basic constitutional principles which led the court to its conclusion.

Plaintiffs, the National Association for the Advancement of Colored People and the parents of children attending the public schools of the Kalamazoo, Michigan School District, bring this action on behalf of themselves and their children and all others similarly situated. Their complaint charges that the defendants, the Kalamazoo Board of Education, the Michigan State Board of Education, and the State Superintendent of Public Instruction, have implemented, developed, maintained, and tolerated public education policies of pupil attendance, staff assignment and facility maintenance which serve to deny plaintiffs equal protection of state law, in violation of the Fourteenth Amendment to the United States Constitution.

This court has previously considered and ruled upon the issue of jurisdiction, and, following a full evidentiary hearing, granted plaintiffs' motion for a preliminary injunction. *Oliver* v. *Kalamazoo Board of Education*, 346 F. Supp. 766 (1971), aff'd. 448 F.2d 635 (6th Cir. 1971). This cause has likewise been

found to be a proper Rule 23 class action by way of written opinions both at the time of the preliminary injunction and during trial.

The facts immediately preceding the instigation of suit are summarized in some detail in the court's August 25, 1971 opinion, supra. Following the extensive study of the recognized problems posed by racial isolation in its schools, the Kalamazoo Board of Education adopted, on May 7, 1971, a modified student attendance plan effectively designed to desegregate all elementary schools throughout the district.[1] This decision was preceded by similar action earlier in 1971 with respect to the junior and senior high schools. The resolutions involved called for desegregation of all Kalamazoo schools, commencing in September of 1971.

The new attendance policy was immediately controversial. The campaign preceding the regular spring school board election of June 14 saw extensive popular interest and heated debate concerning the newly adjusted attendance zones. As a result of the election, two vacancies on the board, previously held by individuals who had supported the desegregation effort, were filled by persons strongly opposed to the May 7 action.

Subsequently on July 6, 1971, six days after the new members assumed their offices, the board voted to reinstate the traditional attendance boundaries as they existed before May 7. At the same time, the newly composed board pressed for and, on July 9, secured the resignation of the district's superintendent, Dr. John Cochran, who still had two years remaining on a three-year employment contract.

Plaintiffs filed suit in this court on August 12, 1971. Initially, they requested and obtained a temporary restraining order to prevent the implementation of the July 6 board resolution pending a hearing to test the resolution's constitutionality. After a hearing on August 24 and 25, 1971, the court issued a preliminary injunction declaring the July 6 resolution unconstitutional and void, and ordering the defendants to implement the

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[1] This school attendance plan has been repeatedly referred to in the testimony and will be hereinafter referred to as the "May 7 plan."

May 7 plan as scheduled, pending a full trial on the merits of the plaintiffs' complaint. This injunction was subsequently modified on October 7, 1971, to restrain the Kalamazoo Board from dismissing all nontenured teachers.[2]

On February 28, 1973, following vast effort in discovery and trial preparation by all parties and the court, trial began. At this time, the Denver case was before the United States Supreme Court, and no decision has yet been handed down. *Keyes* v. *School District No. 1*, 41 U.S.L.W. 5002 (June 12, 1973). In the prevailing uncertainty, in an abundance of caution, and by agreement of the parties, the court decided as a procedural matter that the parties would present proofs in the usual order. The plaintiffs presented their entire case; the defendants submitted their entire case; and the plaintiffs then offered rebuttal. The burden of going forward on an issue was not procedurally shifted to the other side as a result of a particular line of inquiry. It was agreed that the then existing requirements of *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 28 L. Ed. 2d 554, 91 S. Ct. 1267 (1971), would be met within the framework of this procedure. This course was taken with the complete understanding that each party would be given a full opportunity to present every conceivable theory of law and all relevant evidence within the disputed areas.

Thus, each party was given the full opportunity to present its case without particular procedural complications. Although it noted objections from each side to the introduction of certain evidence and to the mode or line of particular questions, the court usually reserved ruling and was most liberal in allowing the presentation of evidence and argumentative analysis.

The anticipated Keyes decision, whatever it was, could not possibly require a new round of evidentiary hearings; each party was given the fullest opportunity for hearing consistent with the demands of judicial economy, and the court assured itself of the benefit of all views concerning the complex issues in the case. Six weeks of trial produced more than four thousand pages of

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[2] The probationary teachers included within their ranks roughly one half of all the black teaching staff in the district. *Oliver* v. *Kalamazoo Board of Education, supra*, at 782-783.

testimony and nearly two thousand exhibits. More than one hundred written pages of factual stipulations are included in the record.

I.

The complaint in this case alleges a constitutional violation involving an inequity or inequality in public education deliberately created, maintained, and perpetuated by the State. Initially, the court must determine whether a condition of educational inequity has existed in Kalamazoo.

This inquiry, in turn, is launched with recognition of the uncontroverted threshhold proposition that, defined in terms of disproportionate racial concentration, regardless of cause, the Kalamazoo School District historically, and especially in recent times, has been racially segregated at all levels of the school system and at a significant number of schools.[3] Reflecting a pattern which had evolved steadily since before 1940, the school racial census figures for 1959 reveal that several elementary schools were racially identifiable. Roosevelt was 23.3% Black; North Westnedge 22.1%; Harding 13.8%; Edison 13.4%. Lincoln was a combined elementary and junior high, with 62.2% of the students being Black. Of all the students in the district, only 7.5% were Black at that time.[4]

The more complete school racial census figures for 1969 indicate that the historical trend toward racially identifiable schools had continued and even accelerated in the decade of the

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[3] As used in this opinion, the terms "racial segregation," "racial concentration," "racial imbalance," "racial identifiability" and "racial isolation," shall refer relatively interchangeably to a condition of disproportionate racial distribution of students. This usage conforms to the practice of most witnesses and authorities introduced at trial.

[4] Pl. Ex.No. 285. Most of the documentary exhibits in this case, including documentary evidence from the files of the Kalamazoo Board of Education and the State Board of Education, were offered by the plaintiffs, and are thus referred to as "Plaintiffs' Exhibits." These exhibits constituted the bulk of documentary evidence in the case, and were used by the defendants in the presentation of their arguments. The defendants offered some additional documentary evidence which has been fully considered by the court, and cited in this opinion where relevant.

1960's. Of the 29 regular elementary schools, 5 contained 92.3% of all Black elementary children. In a system in which 16.1% of the elementary children were Black, Lincoln school was 95.6% Black; Northglade 87.2% Black; Woodward 53.8% Black: Roosevelt 38.8% Black; and Edison 17.1% Black. With the exception of McKinley and West Main, which were 8.8% and 7.4% Black, respectively, all of the remaining elementary schools in the Kalamazoo district contained no more than 5% Black children. [5] The 1969 statistics further reveal that 14 of these schools educated less than 5 Black students each, while six, Fairview, Greenwood, Milwood, Oakwood, Parkwood and Peter Pan, held no Black pupils.

In 1969, Kalamazoo had 5 junior high schools. Of the total junior high student population, 14.7% was Black. Two junior highs, Milwood and Oakwood, contained a combined total of 27 Black students. Only 1.7% of the students attending each of these schools was Black. This left 95.5% of Kalamazoo's Black junior high pupils to attend South, Hillside and Northeastern in proportions of 26.2%, 24.6% and 13.9%, respectively. At the senior high level, one of the district's two schools enrolled virtually all of the Black senior high school students. The 1969 figures show that 93% of these Black students attended Central High School, making that school 19.7% Black, while the remainder attended Loy Norrix High School, making that school 1.6% Black.

Responsible state and Kalamazoo authorities regarded Kalamazoo public schools as segregated in 1969. The Michigan Civil Rights Commission's "Report and Recommendations into the Status of Race Relations in the City of Kalamazoo," published in 1969, stated, "Schools in Kalamazoo are generally segregated," and cited the supporting data. [6]

Even more important, the Kalamazoo citizens' Committee on Integration, which had been appointed by the President of the Board of Education, recited the attendance figures for elementary, junior high, and senior high schools for September,

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[5] Pl. Ex. No. 288.

[6] At 11.

1968, and concluded that the figures illustrated "the serious extent to which racial segregation exists in the Kalamazoo school district." [7] The Committee went on to recommend a program for the integration of the public schools at all levels. This recommendation became the basis for the discussions leading to the May 7 plan. The hostile reaction of many in Kalamazoo to desegregation efforts is evidence that these people, too, regarded Kalamazoo schools as segregated. In light of the Supreme Court's admonition to consider "the community and administration attitudes toward the school" in determining whether schools are segregated, *Keyes, supra,* 41 U.S.L.W. at 5004, this court regards the evidence of the opinion of the people of Kalamazoo as of special significance.

Thus, it is beyond question that the Kalamazoo school district was, in fact, racially segregated. The court finds as a matter of demonstrable fact and established law that this condition of segregation resulted in inequitable and unequal educational opportunities for Black and White students. Educational inequity is a necessary consequence of racial separation of the schools. The reasons which explain this fact are complex, being intricately rooted in the tortured history of race relations of this nation.

According to Dr. Robert L. Green, eminently qualified at trial as an expert witness in the field of educational psychology and on the effects of segregation on Black and White students, the Black experience has been unique in American history. [8] No other racial or ethnic minority was systematically enslaved by the White majority. Rather than having suffered the temporary discomfort and annoyance of social ostracism common to first-generation European ethnic groups, Blacks for hundreds of

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[7] Committee on Integration [sometimes referred to popularly as the Committee on Racial Balance], "Report of the Committee on Racial Balance," Aug. 18, 1969, at 3. Pl. Ex. 38. The Committee on Integration was created by the President of the Kalamazoo Board of Education on Nov. 6, 1968. Id., App. B, 11. Since the Committee was to consider and did consider socio-economic as well as racial problems, it is unclear why it came to be called by some the "Committee on Racial Balance."

[8] Much of the following on the effects of segregation on students is taken from the testimony of Dr. Green, Tr., Vol. 8.

years were subjected to legally and socially institutionalized economic, spiritual, psychological, social and educational deprivation.

It is appropriate to note Gunnar Myrdal's observation on slavery in his classic, An American Dilemma, in his chapter on "Inequality of Justice:"

> Under slavery the Negro was owned, bought, and sold as property; he was worked, housed, fed, and prevented from doing what he wished if it was contrary to the interests of his master. In general, the Negro slave had no "rights" which his owner was bound to respect. Even if in legal theory the slave was given the status of a person under the law as well as the status of property, it was the latter viewpoint which, in practice, became the determining one. In the very relationship between master and slave it was inherent that – without recourse to courts – force and bodily punishment and, under certain circumstances, even the killing of the slave was allowed. "... all slaveholders are under the shield of a perpetual license to murder," exclaimed Hinton R. Helper in his unsparing onslaught on the plantation class and the slavery institution. Thomas Jefferson saw clearly the moral danger of the slavery institution:
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> > The whole commerce between master and slave is a perpetual exercise of the most boisterous passions, the most unremitting despotism on the one part, and degrading submissions on the other. Our children see this, and learn to imitate it. ... The man must be a prodigy who can retain his manners and morals undepraved by such circumstances. And with that execration should the statesman be loaded, who, permitting one half the citizens to trample on the rights of the other, transforming those into despots, and these into enemies, destroys the morals of one part, and the *amor patriae* of the other. ... [Can] the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are the gift of God? That they are not to be violated but

> with His wrath? Indeed, I tremble for my country when I reflect that God is just; that His justice cannot sleep forever."[9] (Emphasis supplied.)

Unfortunately, White attitudes originally attendant to the institution of slavery persisted after the adoption of the Thirteenth Amendment. Although legal slavery died, Americans created, during the four decades after the Civil War, a new legal and social pattern of discrimination based upon race. Many of these forms of institutionalized repression have persisted to the present, with the result that Black Americans are often denied the equality to which they are entitled in our constitutional democratic republic.

Inextricably intertwined with the dominating inescapable heritage of slavery and all its attendant dehumanizing ramifications, every aspect of the human condition of many Black people in America today is almost irremediably repressed. These continuing inhuman conditions of uncivilized servitude and inferior status have become known as vestiges of slavery.

The effects of this historical status of subservience and formalized inferiority continue to be pervasive. Past barriers to personal fulfillment and attainment cannot reasonably be minimized in assessing current impediments to equal opportunity. In the context of past officially sanctioned and present subtly insidious and invidious private and public racial discrimination against Black people as a class, a school environment which for whatever reason involves marked, disproportionate racial concentration inherently generates acute consciousness of race. As situated in a segregated surrounding, this inflated consciousness, studies described at trial have shown, triggers artificial, unrealistic personal reactions based on misconceived but, in view of historical predicates, *understandable individual perceptions of the significance of racial differences.*

Although disproportionate racial concentration of Black children in the schools might not have adverse consequences in

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[9] At 530-531 (1944).

all times and places, it certainly does in the context of the present forms of social organization, which are conditioned by legacy of slavery. One of the adverse effects of racial segregation is in the area of individual achievement.

According to studies made by Dr. Green and others, segregated Black children tend to infer that they are isolated from the White majority because of their race, and, drawing on their observations of the deprivations experienced by Black adults, they also tend to infer that their own potential is limited because of their race. It is not surprising that Black children have evidenced reduced self-esteem in a segregated environment and concommitant diminished motivation to succeed. The culturally-induced lack of self-esteem and diminished motivation in turn operate to measurably reduce achievement.

Thus, in Kalamazoo, where many Black students attend disproportionately Black schools, Black students have fallen as many as four grades behind their White counterparts by the time they leave school. Furthermore, the Citizens' Committee on Integration, popularly referred to as the Committee on Racial Balance, reported in 1969 that identifiably Black schools ranked at the bottom of the system in terms of academic achievement.[10]

During the trial, there was much conflicting testimony concerning the incidental question of whether a September 1972 administration of a Metropolitan Achievement Test in Kalamazoo did or did not establish that Blacks enter school in Kalamazoo at or around the national norm in the first grade. Mr. Robert J. Huyser, Director of the State Education Assessment program, and Dr. William Coats, Kalamazoo's Superintendent of Schools, strongly disagreed on this question. Dr. Coats has both theoretical knowledge and great practical experience in the sometimes esoteric subject of educational testing, and also has a close personal acquaintance with the Kalamazoo situation. Mr. Huyser's responses on cross-examination suggest that he did not properly interpret the data. The court thus finds that Dr. Coats' testimony was the more reliable, and that Black children enter Kalamazoo schools at a very competitive level.

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[10] Committee on Integration, supra, note 7 at 3.

Individual growth in the educational system occurs not only in the area of achievement, the acquisition of cognitive skills, but also in the areas of social and psychological development. Segregation is perhaps more detrimental to the Black student's social and psychological development than to his achievement level. Finding himself isolated to a significant degree from the bulk of the white population, witnessing the disparate superiority of the status of White adults over Black adults in many circumstances, and perhaps further observing a pronounced underrepresentation of Blacks in position of leadership in his school, where this is the case, the Black child may become reluctant to assert himself in the presence of whites and unduly pessimistic concerning his ability to interact or compete successfully with Whites of his own generation. [11]

Teacher reaction to segregated educational circumstances frequently operates to the disadvantage of students. Dubbed by some researchers as a kind of "self-fulfilling prophecy," the impact on Black students of teacher expectations based on race has been demonstrated by several studies. Affected by racial sterotypes as well as by actual patterns of disparate Black-White performance levels in the general society, teachers may tend to "teach down" to Black children, expecting and therefore eliciting low levels of performance.

As Dr. Green further testified, racially segregated schools usually tend to be perceived as "good" or "bad" depending solely on whether they are identifiably White or Black, respectively. Such community perceptions, held by Blacks as well as Whites, contributes to the negative, repressive atmosphere surrounding a segregated school and inhibiting social, psychological, and cognitive development by Black students.

The negative impact of racially segregated schools is not confined exclusively to Black students. White children may also react to racial isolation in ways harmful to themselves. White pupils are apt to form an irrational attitude of *inherent superiority and are apt to develop an unrealistic concept of homo-*

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[11] 1 U.S. Commission on Civil Rights, *Racial Isolation in the Public Schools* 114 (1967).

geneous society in which certain values enjoy universal acceptance. Similarly, because of their cultural isolation, segregated White children tend *to lose sight of those fundamental values of our constitutional system which, while respecting individual differences, favor free access on wide social mobility to all persons regardless of race, creed, or national origin, and which thereby promote a healthy interchange among persons of different backgrounds.*

The state of mind fostered by racial and cultural isolation heightens racial conflicts and divisiveness in the country and thus adversely affects the domestic tranquility the Constitution was designed to promote. White students who have been educated in segregated public schools are thus ill-prepared to deal with the pluralistic society which actually exists in the adult world beyond the classroom.

In part because of segregated schools, as Charles E. Silberman has written:

> "[T]he public schools are failing dismally in what has always been regarded as one of their primary tasks – in Horace Mann's phrase, to be '*the great equalizer of the conditions of men,*' facilitating the movement of the poor and disadvantaged into the mainstream of American economic and social life. Far from being 'the great equalizer, the schools help perpetuate the differences in conditions, or at the very least, do little to reduce them. *If the United States is to become a truly just and humane society, the schools will have to do an incomparably better job than they are now doing of educating youngsters from minority-group and lower-class homes.*" [12] (Emphasis supplied.)

The subject of race in America and the consequences of racial segregation in the schools might be explored at much greater length. However, it clearly appears from the record in this case, summarized above, that in the context of modern

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[12] Quoted in Senate Select Committee on Equal Educational Opportunity, Toward Equal Educational Opportunity, Sen. Rep. No. 92-000, 92nd Cong., 2d Sess., Part III. Inequality in Education 95 (1972).

America, segregated education is detrimental to both Black and White students, creating, especially for Black students, psychological and social difficulties which have a substantial adverse impact on overall individual development. Segregated education plainly denies equal educational opportunity.

The findings made by the court in this case parallel those made by the United States Supreme Court in *Brown* v. *Board of Education*, 347 U.S. 483, 98 L.Ed. 873, 74 S.Ct. 686 (1954) [Brown I]. In addressing the precise issue of the effect of racial separation on grade and high school students, the Supreme Court in Brown quoted with approval language from the District Court as follows:

> " 'Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is *greater* when it has the sanction of law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to (retard) the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racially integrated school system.' " 347 U.S. at 494. (Emphasis supplied.)

Although much may be said about the fact that Brown involved obvious and conspicuous state action separating Blacks and Whites by statute, with respect to the simple issue of whether racial separation fundamentally poses a situation of inequity, Brown was and is unequivocal. "Separate educational facilities are inherently unequal." 347 U.S. at 495.

II.

The Fourteenth Amendment of the United States Constitution declares, "No state shall . . . deny to any person within its jurisdiction equal protection of the laws." [13] The law is clear that official action at any hierarchial level which denies the plaint-

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[13] Pertinent excerpts from Supreme Court cases interpreting the Fourteenth Amendment are included in the Appendices. App. A.

iffs equal protection of the laws is unconstitutional. Ex parte Virginia, 100 U.S. 339, 346-347 (1880). It is established that "under the Constitution and laws of Michigan, the public school system is a State function and that local school districts are instrumentalities of the State created for administrative convenience.[14] Members of local school boards as well as members of the State Board of Education and the Superintendent of Public Institution are State officers, agents of the State in every official respect.

Before entering upon the duties of their respective offices, all are required by the Michigan Constitution of 1963, Art. II, Sec. 1, to take and subscribe to the following oath or affirmation: "I do solemnly swear (or affirm) that I will support the Constitution of the United States and the constitution of this state, and that I will faithfully discharge the duties of the office of... according to the best of my ability." Each officer thus undertakes a personal and official responsibility to abide by the Constitution of the United States and of Michigan.

The principal issue in this case is whether the defendant State officers have denied the plaintiffs equal protection of the laws.

For the purposes of this case, the court assumes that the plaintiffs must establish that the defendants are guilty of de jure segregation of the Kalamazoo public schools. The Fifth Circuit, which has a vast experience with school desegregation cases, recently rejected "the anodyne dichotomy of classical de facto and de jure segregation." *Cisneros* v. *Corpus Christi Independent School District*, 467 F.2d 142, 148 (1972).

That court held that a finding of unlawful segregation would be supported by two distinct factual determinations. "First, a denial of equal educational opportunity must be found to exist, defined as racial or ethnic segregation. Secondly, this

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[14] *Bradley* v. *Milliken*, Nos. 72-1809–72-1814, at 56 (6th Cir. June 12, 1973) (en banc). The analysis of State law concerning education in Michigan in Id., 56-62, is adopted and incorporated by reference for the purposes of this opinion. App. B.

segregation must be the result of state action." While the specific quantity of state action and the severity of the segregation necessary to sustain a constitutional violation was left to be dealt with on a case by case basis, the court noted that, as a general rule, it "need only find a real and significant relationship, in terms of cause and effect, between state action and the denial of educational opportunity occasioned by the racial and ethnic separation of public school students." Id. See Appendix C.

However, the Supreme Court, in Keyes, supra, assumed for the purposes of that case that a finding of de jure segregation was required to support a finding of a constitutional violation. This court follows the Supreme Court for the purposes of the present case, and, like the Supreme Court, leaves for further adjudication in other cases the question of whether something other than de jure segregation constitutes a violation of the Fourteenth Amendment.

The Kalamazoo board adopted a reasonably comprehensive desegregation plan on May 7, 1971, and then, after an election, rescinded the plan on July 6, 1971. While these events and their importance are explored in more detail later, it is pertinent to inquire here as to the legal standards for determining whether the July 6 rescission was itself a significant de jure act of segregation. In Denver, the school board adopted three resolutions, 1520, 1524 and 1531, to desegregate schools in the Park Hill area, and then subsequently rescinded them. While the trial court enjoined the rescission of these resolutions as to most of the schools after a finding that these schools had been intentionally segregated by the Denver school board, the court also permanently enjoined the rescission of the plan as to two schools, East High and Cole Junior High, which had not been previously segregated. The court found that the original plan would operate to prevent East High from becoming segregated and to improve educational opportunities for Black students at Cole, and held that the frustration of these objectives by a rescission of the plan was in itself unconstitutional. *Keyes* v. *School District No. 1*, 313 F.Supp. 61, 67 (D. Colo. 1970). The decree was approved by the Tenth Circuit on appeal, although the appellate court did not reach the question of the rescission. 445 F.2d 990, 999, 1007 (1971). As to this

portion of the Tenth Circuit's action in the Denver case, the Supreme Court denied certiorari. 41 U.S.L.W. at 5003. However, it is especially significant that the Supreme Court noted with implied approval that the trial court had found that the rescission of the desegregation plan as to Cole and East was itself an intentionally segregative act. Id. at 5005, n. 10.

The Sixth Circuit has addressed the issue of the validity of a nullification of a desegregation plan in *Bradley* v. *Milliken*, 443 F.2d 897 (1970). Relying in part on the trial court's decision in Keyes, supra, the Sixth Circuit broadly and emphatically declared:

> "State action in any form, whether by statute, act of the executive department of a State or local government, or otherwise, will not be permitted to impede, delay or frustrate proceedings to protect the rights guaranteed to members of all races under the Fourteenth Amendment." Id. at 902.

The court went on to strike down as unconstitutional a legislative attempt to nullify a plan of the Detroit school board to desegregate its high schools. Since the Fourteenth Amendment plainly reaches all state action, and since the Sixth Circuit relied in part on Keyes, supra, which did not involve an attempted legislative nullification, it appears that the Bradley doctrine must extend to actions of state agencies such as local school boards.

Thus, on the strength of Keyes, supra, and Bradley, supra, it appears that the Kalamazoo board's attempted nullification of the May 7 plan is itself a de jure segregative act and a constitutional violation entitling the plaintiffs to a remedy in this court, if the May 7 plan was a significant and bona fide attempt by the school board to implement the Fourteenth Amendment in Kalamazoo schools. This factual question, and others related to the adoption and rescission of the desegregation plan, are discussed further below.

However, as in Keyes, supra, so in this case, in an abundance of caution, neither the court nor the parties have been satisfied to litigate only the issue of the rescission of the May 7 plan. Rather, the plaintiffs have argued at length that the defendant state and local authorities were legally responsible under the Fourteenth Amendment for the segregated conditions which have existed in

Kalamazoo, and that therefore, the Kalamazoo board was constitutionally required to adopt a substantial desegregation plan on May 7, 1971. The defendants have vigorously denied that they were responsible for the segregated conditions found to exist in Kalamazoo, and have insisted that the May 7 plan was not constitutionally required.

As a first step toward resolving this issue, the court has had to ascertain the legal standards to be applied to determine whether the defendants have been guilty of de jure segregation before May 7, 1971. Although not as fully refined as the comparatively ancient common law torts, the major legal elements and conditioning factors of the constitutional tort of de jure segregation [15] are reasonably clear. Under the Keyes theorem, in addition to showing that segregated schools exist, plaintiffs should establish (1) that the state to a significant degree caused or maintained these segregated conditions, and (2) that the state intentionally, i.e., purposefully, created or maintained them.

Experience since Brown I, supra, has revealed that circumstantial factors of space, time, and quantity may affect causation and intention, and thus may affect the finding of liability and the extent of the remedy. Keyes, supra. Spacial factors are matters of geography and demography in a school district which may limit the impact of a school board's actions. Time is also an important, though sometimes elusive factor. While each school desegregation case requires an extensive probing of the historical development of a school district, the state, and the nation, the ultimate focus is the present situation and remedy, if any, which is presently required. Finally, matters of quantity and degree of space, time, and causation and intention certainly affect the finding of liability.

Before moving to an examination of the central factual issues, it is necessary to discuss further these major elements and conditioning factors as they relate specifically to the case before the court.

Under Keyes, in an intentional case, to be guilty of a consti-

[15] While the substantive requirements of the constitutional tort are derived from the Fourteenth Amendment and to a lesser extent from various implementing statutes, this court has jurisdiction by virtue of several jurisdictional statutes passed by Congress.

tutional violation, the state and local authorities must have in fact caused or maintained the segregated conditions which are complained of. Under this theory, it is a complete defense that the state and local authorities have not at all caused or maintained these conditions. Similarly, the state will not be held legally responsible if it has only occasionally committed segregative acts and these acts are of trivial importance and bear no significant relation to the modern situation.

Rather, the standard must be that the state and local agencies to a substantial degree contributed to the creation or maintenance of segregated schooling in Kalamazoo. In a tort case, it would be proper to instruct the jury on the issue of proximate cause as follows: "An injury or damage is proximately caused by an act or a failure to act, whenever it appears from the evidence in the case, that the act or omission played a substantial part in bringing about or actually causing the injury or damage; and that the injury or damage was either a direct result or a reasonably probably consequence of the act or omission."[16]

Under this theory, the issue of causation also involves the conditioning special factors discussed by the Supreme Court in Keyes, supra. Denver had two areas of minority group concentration and segregated schools, the Park Hill section and the core city area. Lower courts had found that the school authorities had intentionally segregated Park Hill, and had ordered desegregation of that section. The Supreme Court did not question the correctness of this ruling, but explored its significance with respect to the core city and other Denver schools.

Among other things, the Supreme Court suggested that Park Hill might be a "separate, identifiable and unrelated section of the school district," and remanded for further findings on this issue, Keyes, supra, 41 U.S.L.W. at 5006, 5009. If Park Hill was found to be separate, the range of available remedies would apparently be limited, even if the core city schools were found on remand to be intentionally segregated. Id. at 5009.

On the basis of its examination of maps, verbal testimony

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[16] 2 Devitt and Blackmar, Federal Jury Practice and Instructions Sec. 73.18 (2d ed. 1970). Of course, there might be more than one "proximate cause." See proposed jury instruction, Id. at Sec. 73.19.

and census and other demographic data, this court finds that Kalamazoo, for the purposes of this case, is to be treated as a single, undivided district. While there is an arc of minority concentration running from the north central portion of the city to the east and southeast central portion, there is no area in Kalamazoo which corresponds to the Park Hill section of Denver geographically or historically. Moreover, this court finds that there is no section of Kalamazoo which is a "separate, identifiable and unrelated" unit by reason of geography or a natural or artificial boundary. Keyes, supra, 41 U.S.L.W. at 5006. In the northeastern part of the city, the Kalamazoo River apparently sets off a separate section. However, while the river has been used to set elementary and junior high school boundaries, it has not usually been used to set senior high boundaries. Apparently, the school authorities or the people of Kalamazoo have not consistently regarded the northeast section as separate from and unrelated to the rest of the school district.

In addition, on both sides of the river near the center of the city there are concentrations of minority people and there were in 1970, racially identifiable schools. Most minority people and pre-1971 racially identifiable schools were located west and south of the river, outside the northeast section.

Elsewhere in Kalamazoo, railroad tracks, highways, and major roads slice into the city. While Kalamazoo authorities have sometimes taken these features into account for planning purposes, no combination of them isolates a section which has been consistently regarded or treated as a distinct section. Consequently, there is no need for the court to subdivide Kalamazoo into separate geographical units, and to consider the possibility of a separate remedy, or no remedy, for each section.

Moreover, relative to Denver, Kalamazoo is a geographically different and compact school district. Any significant Kalamazoo school board action with respect to any number of schools must, in the absence of particular qualifying circumstances, be considered as affecting a "meaningful" or "substantial" portion of the Kalamazoo school system[17] within the meaning of Keyes,

[17] In 1969, Kalamazoo had 25 regular elementary schools, 5 junior high schools and 2 high schools. It also had a number of relatively small special purpose buildings and schools.

supra, 41 U.S.L.W. at 5005-5009. This is because an action which affects any one school necessarily has a reciprocal effect on other schools within the system.

As Judge John Minor Wisdom of the Fifth Circuit, which has extensive experience with desegregation suits, recently stated: "Infection at one school infects all schools. To take the most simple example, in a two school system, all blacks at one school means all or almost all whites at the other." *United States* v. *Texas Educational Agency*, 467 F.2d 848, 888 (1972), cited in *Keyes, supra*, 41 U.S.L.W. at 5005, n. 12. Similarly, any decision to build a new school or to expand existing facilities necessarily entails a decision not to expend the committed resources on other schools or programs within the system.

An additional problem concerning causation ought to be noticed, although it cannot be extensively discussed at this point. Although the Fourteenth Amendment refers broadly to *state* action, most courts have assumed that in the absence of state statutes of the type at issue in *Brown I, supra*, it was simply irrelevant whether state agencies other than school authorities were implicated directly or indirectly in the creation or maintenance of segregated schools. The only relevant question has been whether local school boards were legally responsible for the segregated conditions found to exist. However, in this case, the school board claims that it has merely applied a racially neutral neighborhood school policy, and that neighborhood residential segregation is responsible for the resultant segregated schooling. In light of the general words of the Fourteenth Amendment, it becomes relevant to inquire in assessing the validity of this defense whether state agencies other than school boards have, by their deliberate actions and inactions, contributed to a significant degree to the creation or maintenance of segregated neighborhoods. This issue, and its impact on the present case, is discussed in Part III, infra. [18]

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[18] However, this court does find, infra, apart from the action of other state agencies vis-a-vis segregated neighborhoods, that the Kalamazoo Board of education itself committed a constitutional violation through its actions and inactions which intentionally and substantially contributed to the creation and maintenance of segregated schools in the district.

Under *Keyes*, defendants must not only have caused the schools to be segregated, but must have intentionally caused them to be segregated. Ascertaining the board's intentions is certainly difficult, but it is not at all impossible.

The starting place is the standards and processes evolved by the common law for determining the relevant state of mind of the defendant, or defendants, in an intentional tort suit. In general, it is reasonable to infer that people intend the natural and probably consequences of acts knowlingly done or knowingly omitted. Thus, in a case tried to a jury, it would be proper to instruct that:

> "In the absence of evidence in the case which leads the jury to a different or contrary conclusion, you may draw the inference and find that any person involved intended such natural and probable consequences as one standing in like circumstances, and possessing like knowledge, should reasonably have expected to result from any act knowingly done, or knowingly omitted, by such person. An act, or failure to act, is knowingly done, if done voluntarily and intentionally, and not because of mistake or accident or other innocent reason." [19]

Since intent may be proved by direct, indirect or circumstantial evidence, all the facts and circumstances in evidence in the case which may aid in the determination of state of mind may be considered. [20]

Fortunately, this court is not without guidance in applying these basic standards to the complex school desegregation case presently before it. It is established that where an appropriate factual showing has been made, including a showing that an existing segregated situation is to a significant extent the natural, probable, and actual result of the actions and inactions of the state and local agencies, the plaintiffs have laid an evidentiary foundation for the conclusion that the results, segregated schools, were

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[19] 2 Devitt and Blackmar, supra note 16 at Sec. 74.03. The term "other innocent reason" at the end of the final sentence refers in this context not to defenses in the area of causation or to such affirmative defenses as consent or self-defense, but rather refers to matters analogous to mistake or accident which would tend to negate knowledge or affirmative purpose.

[20] Id.

intended to be reached by these authorities. *Bradley* v. *Milliken*, Nos. 72-1809-14 at 10-11, 48-49 (6th Cir. June 12, 1973) (en banc); *Davis* v. *School District of Pontiac*, 309 F. Supp. 734, 744 (E.D. Mich. 1970), aff'd. 443 F.2d 573 (6th Cir. 1971), cited with implied approval, *Keyes, supra*, 41 U.S.L.W. at 5008. In the district court decisions in the Denver case, it inferred de jure segregation from among other things, the fact that the school board had located a new elementary school "with conscious knowledge that it would be a segregated school" *Keyes* v. *School District No. 1*, 303 F. Supp. 279 285 (D. Colo. 1969), cited with approval, 41 U.S.L.W. at 5005. Of course, in order to make its ultimate determination on the issue of intention, the court must fully consider the evidence and arguments presented by all the parties, including the claim by the Kalamazoo school board that it was resolutely applying a racially neutral neighborhood school policy.

Some courts have further refined the standard of proof to be applied in light of special circumstances found in particular school desegregation cases. Thus, the finding that some schools had almost exclusively Black students and faculties and other schools had almost exclusively White students and faculties was held to create a "presumption" that faculty assignments were made on a discriminatory basis. The effect of the presumption was to place an affirmative burden on the school authorities to demonstrate the constitutionality of their acts. *United States* v. *School District 151*, 301 F.Supp. 201, 228 (N.D. Ill. 1969), mod. on other grounds, 432 F.2d 1147 (7th Cir. 1970), cited with implied approval, *Keyes, supra*, 41 U.S.L.W. at 5008.

In Keyes, the Supreme Court, noting the relevance of a finding of intentional segregation in one portion of a school system to the issue of the board's intent with respect to other segregated schools, Id. at 5007, expressly held that "a finding of intentionally segregative school board actions in a meaningful portion of a school system . . . establishes . . . a prima facie case of unlawful segregative design on the part of school authorities, and shifts to those authorities the burden of proving that other segregated schools within the system are not also the result of intentionally segregative actions." Id.

The issue of whether a constitutional violation has been committed is affected not only by the circumstantial factors

highlighted in Keyes, supra, but also by the fact that the state acts at several governmental levels. The law is clear that official state action at *any* hierarchial level which directly and intentionally creates, sustains, maintains, or aggravates racial segregation in schools may be cited by plaintiffs to hold defendants accountable for the inequities which result.

By the terms of the Michigan Constitution, Art. VIII, Sec. 3, the State Board of Education is given "leadership and general supervision over all public education." Because the State Board possesses such broad constitutional power, its deliberate action and inaction must be weighed in the judicial evaluation of the issue of state governmental responsibility for the establishment and maintenance of unequal educational opportunity. Under certain circumstances, conscious neglect, even though characterized as "benign" by some who do not suffer the ill effects, can be very significant for the development of policy, especially where the clearly foreseeable and actual result is to allow the creation or to ensure the maintenance of a segregated condition in the public schools.

However, the immediate task is to determine whether the Kalamazoo school board, apart from and independent of any other state agencies, by its actions and inactions, its commissions and omissions, intentionally contributed in a significant way to the creation or perpetuation of segregated schools. In making the determination, the court must, within the limits of its capabilities, examine all the relevant evidence and consider all the relevant arguments. The focus must be not only on individual school board action, but also the evolving *pattern* of school board policy. As the Sixth Circuit pointed out in Davis, supra, each school board decision taken alone might not compel the conclusion that the Board of Education intended to foster segregation but, taken together, the decisions might lead to the conclusion that a "purposeful pattern of racial discrimination has existed in the school system in the past." 443 F.2d at 576.

Although the State government retains ultimate legal control and exercises much actual control, in practice the Kalamazoo

Board of Education has had primary if not exclusive operational control over Kalamazoo public schools. Thus, the local board sets attendance zones, locates and constructs new schools, adds permanent or temporary classrooms to or completely modernizes old schools, decides whether or not to annex new areas, and hires and assigns administrators and faculty. Since school board decisions of these matters substantially determine the racial composition of students and faculty in each of its schools, the board must be held responsible in fact for any segregated condition which exists. That the board has power to substantially reduce segregated conditions is obvious from the terms and results of the May 7 plan, all of which are within the board's operational authority.

Furthermore, over the long run, school board choices with respect to the location and capacity of schools, combined with other policy decisions, may help to determine the racial composition of neighborhoods, as the Supreme Court has noted:

> The construction of new schools and the closing of old ones are two of the most important functions of local school authorities and also two of the most complex. They must decide *questions of location* and *capacity* in light of population growth, finances, land values, site availability, through an almost endless list of factors to be considered. The result of this will be a decision which, when combined with one technique or another of student assignment, will determine the racial composition of the student body in each school in the system. Over the long run, the consequences of the choices will be far reaching. People gravitate toward school facilities, just as schools are located in response to the needs of people. *The location of schools may thus influence the patterns of residential development of a metropolitan area and have important impact on composition of inner-city neighborhoods.*
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> In the past, choices in this respect have been used as a potent weapon for creating or maintaining a state-segregated school system. In addition to the classic pattern of building schools specifically intended for Negro or white students, school authorities have sometimes, since *Brown*, closed

schools which appeared likely to become racially mixed through changes in neighborhood residential patterns. This was sometimes accompanied by building new schools in the areas of white suburban expansion farthest from Negro population centers in order to maintain the separation of the races with a minimum departure from the formal principles of "neighborhood zoning." Such a policy does more than simply influence the short-run composition of the student body of a new school. It may well promote segregated residential patterns which, when combined with "neighborhood zoning," further lock the school system into the mold of separation of the races. Upon a proper showing a district court may consider this in fashioning a remedy.

In ascertaining the existence of legally imposed school segregation, the existence of a pattern of school construction and abandonment is thus a factor of great weight. Swann, supra, 402 U.S. 20-21. See also Keyes, supra, 41 U.S.L.W. at 5005, Davis, supra, 443 F.2d at 576. *Kelley* v. *Guinn*, 456 F.2d 100 (9th Cir. 1972). (Emphasis supplied.)

The Board alleges that for many decades before the adoption of the May 7, 1971 plan, it exercised its extensive powers according to a "neighborhood school policy." In general, the policy was that consideration was given to providing an adequate number of classroom desks in the general area of the children's residence.

Just before World War II, the stated policy was to establish a half-mile radius as a suitable attendance zone for elementary schools, although this radius was later increased to three-quarters of a mile. A junior high, according to the pre-World War II policy should not require the majority of its students to go more than a mile. Two or three miles were not considered unreasonable. A standard elementary school would have 13 rooms, and a student capacity of about 392. In addition, the policy envisioned a uniform curriculum, with uniformly adequate facilities for carrying out the curricular program. The major goals and principal standards of the neighborhood policy have allegedly been in effect

during the entire period after World War II until 1971.[21] Allegedly, the policy has always been administered in a racially neutral fashion.

Some aspects of this policy would be unobjectionable in any context. The attempt to provide a uniform curriculum and uniformly adequate facilities would be part of any rational school program. Indeed, providing equal curricular offerings and equal facilities is part of the provision of equal educational opportunity to all students, and thus is not only desirable and rational, but constitutionally required.

However, the court finds that locating a school within the general area of each child's residence serves no compelling educational objective which supersedes constitutionally protected rights.[21a] One apparently attractive objective the neighborhood school policy does seem to serve is the minimization of inconvenience.

A brief examination of the maps showing 1970 elementary attendance zones[22] reveals that the general and subsidiary standards of Kalamazoo's "neighborhood school policy" were inconsistently applied. Elementary school attendance boundaries, sometimes following prominent natural or artificial features and sometimes not, form a bewildering variety of geometric shapes and sizes. The map overlay exhibits reflecting circles 1/2 mile in radius, corresponding to the walking distance figure referred to by the defendants, reveal substantial overlap and little correspondence to

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[21] Stip. #13, p. 4, no. 9, quoting "1936 Building and Survey Program for Kalamazoo, Michigan." Testimony of Maynard C. Morgan, whose official title is Assistant for Child Accounting and who is head of the department which keeps records of students, attendance and school boundaries and the like. In 1971, the witness had been with the Kalamazoo Board of Education in this department for 39 years. Stip. #12, p. 8, no. 24.

[21a] See further discussion, infra, at 113-116.

[22] During trial, a "large map" of Kalamazoo, Pl. Ex. 1674, showing racial concentrations within census tracts in 1970, was often referred to by witnesses, the parties, and the court. Many smaller maps designed to illustrate various matters were introduced. Pl. Ex. 1672 is a small map which, like 1674, shows racial concentrations within census tracts in Kalamazoo in 1970. It has been extensively used by the court. Pl. Ex. 1675 is a clear plastic overlay fitting over Pl. Ex. 1672, showing boundaries of elementary schools which existed in 1970.

actual attendance boundaries.[23] It is apparent that Kalamazoo elementary schools were not situated and boundaries were not drawn in a fashion which regularly placed students in the schools closest to their homes.

Moreover, the stated ideal elementary school size of 13 classrooms (2 classrooms for each of 6 grades, plus one kindergarten room) was not regularly followed. Of 25 regular elementary school buildings in use in 1969,[24] only 3 had 13 grade and kindergarten classrooms. Eleven schools had more than 13 grade and kindergarten classrooms, and 11 had less. The largest school was Woodward, with 24 such rooms, and the smallest school was Hillcrest, with 7. The average size of the 25 schools was 14 grade and kindergarten rooms.

One elementary school, Chime, which served a largely rural area, had an attendance zone almost as large as that served by all the other schools combined. In 1969, it had 16 grade and kindergarten classrooms,[25] making it more than twice as large as the smallest school in the system. In addition, Kalamazoo has operated a variety of programs for special need programs that have taken students to schools far from their homes. The point is not simply that Chime and the special programs are inconsistent with the general neighborhood policy, but that the Kalamazoo board has so easily ignored the whole concept. Were the neighborhood school educationally necessary, Kalamazoo would have long since taken steps to disperse Chime and to bring special services to the students.

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[23] Pl. Ex. 1864. Circles 1-1/2 miles in radius, corresponding to the distance beyond which students have traditionally been transported at school district expense, produce a ridiculous pattern on the school district map which bears absolutely no meaningful coincidence with established 1970 attendance boundaries. Pl. Ex. 1865.

[24] Kalamazoo Public Schools, Division of Building and Grounds, "Inventory of Elementary Building Use" (Dec. 1969), Pl. Ex. 316. The calculations which follow are based on this document. The figures are not taken as representing the capacity of the schools under all circumstances. Milwood and Woodward each contain who buildings on the same campus, and have been treated as one school. Excluded are Peter Pan, Pleasant Park, and Fairview Primaries, Greenwood Early Elementary, Kennedy Center, Upjohn School, U.S. 12 School, New Hurd School.

[25] Id., "Southwest Section."

Neither junior nor senior high schools in Kalamazoo serve "neighborhoods" in the commonly understood meaning of that term, since the attendance zones are so large.[26] Rather, Kalamazoo has dispersed its junior high schools around the periphery of the district, having one each in the northwest, southwest, southeast, and northeast, and an additional junior high in the south central portion of the city. There are only two senior high schools in Kalamazoo, one being located until January 1972 just south of the main business district near the center of the district's population, and another at the extreme southern edge of the district.

The statistics concerning the Kalamazoo board's transportation of students before the May 7 plan provide further evidence not only of the inconstancy of application of the "neighborhood school policy," but also of the ease with which the public schools have accommodated the many departures from the "neighborhood school" concept. In September 1967, the Kalamazoo board decided to transport at public school expense each student who lived more than a mile and a half from school.[27] Some transportation was provided by the public schools, and some by the city bus line under contract with the board. According to the board's statistics, a total of 1155 public elementary school children, or 11.7% of the total, were transported at district expense for reasons other than safety or desegregation during the 1970-71 school year.[28] In 1970-71, the board also transported 1527 public junior high students, about 39% of the total, for reasons other than safety or desegregation.[29]

On the basis of even this cursory view of a very small amount of the evidence presented in this case, this court cannot

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[26] Pl. Ex. 1676, overlay map showing junior high attendance zones in 1970; Pl. Ex. 1677, showing senior high attendance zones in 1970.

[27] Testimony of Mr. Maynard Morgan, Tr., XVII, 3556-3557. The board would also transport the few students who lived closer to the school than 1-1/2 miles, but whose routes to school were especially hazardous.

[28] Def. Kalamazoo Board of Education [KBE] Ex. 1981. Pl. Ex. 289. Although there was no breakdown of the transportation figures by school, many of the elementary students transported undoubtedly went to largely rural Chime, which had an enrollment of 442 in 1970. Pl. Ex. 289.

[29] KBE Ex. 1981. Pl. Ex. 289.

conclude that the Kalmazoo school board resolutely and consistently followed a "neighborhood school policy." "Policy" is taken here to mean not merely what is actually done, but rather a set of general goals which are adopted for governmentally legitimate reasons, which bear a rational relation to the functions to be served, and which are routinely and consistently followed, unless a sufficiently compelling reason appears for departures in individual cases. The alleged "policy" has been too often departed from to have been a firm and consistent goal of the Kalamazoo board.

This court would be the last to minimize the complexities and difficulties of administering a school system. Were it not for the element of race, the court might conclude that the Kalamazoo board simply coped with problems as they arose, making attempts to relate them to stated goals, but in practice doing ultimately what seemed acceptable at the time. But the element of race is present in Kalamazoo, the Kalamazoo schools are segregated, and Black children are being denied equal educational opportunity as a consequence. Although the Kalamazoo Board of Education did not formally and publicly indicate that it was considering race when it made decisions on the matters affecting racial composition of schools, the plaintiffs nonetheless contend that the school board intentionally contributed to the creation and perpetuation of these segregated schools. Indeed, as the parties have stipulated, there is no indication that the Kalamazoo board took any positive action to confront the problem of racial segregation before the late 1960's. [30] Thus, it becomes necessary for this court to explore in more detail the development of the Kalamazoo public schools.

Between 1945 and 1970, there were several types of residential areas in Kalamazoo. The older areas were in the central part of the city. Some of these sections were deteriorating throughout the period, while others were well maintained. Most Black people in Kalamazoo were concentrated in a crescent or arc running from the north central part of the city to the southeast central part. Around the periphery of Kalamazoo, new developments sprang up after World War II which were suburban in character, although they were not far from the central business district. In addition, especially in the 1950's, Kalamazoo annexed

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[30] Stip. #5, p. 1. nos. 1, 2, 3; Stip. #12, p. 31, no. 11.

many areas which are rural, but are in transit into suburban areas. Most of the people in the new developments and in the annexed areas are White.

The record shows that there was a relatively large number of attendance boundary changes between 1945 and 1970 in the predominantly White areas in conjunction with the annexations and in conjunction with the construction of new school facilities.

However, with a few exceptions noted below, the Kalamazoo school board did not often change attendance boundaries of the schools in the central area of the city. Among the schools whose boundaries were rigidly maintained were those attended by the overwhelming majority of Black children in Kalamazoo. After exploration of all aspects of the Kalamazoo board's practices, some of which are further detailed below, the court has concluded that this rigidification of the boundaries of schools attended by the majority of Black students had the predictable and actual effect of cementing Black students into special areas and particular schools within those areas, and of preserving many other areas and schools for Whites.

Among the matters within the control of the school board are attendance zones. While the board insists that it follows a "neighborhood" school policy, it must be emphasized that generally the board defines the "neighborhood" when it draws the boundaries.

The Kalamazoo board occasionally departed from the policy of rigidly maintaining school boundaries in the area of Black residence by establishing optional attendance zones. One of these was created in conjunction with the closing of Harding Elementary School in 1960. The Harding School attendance area was divided into two sections. One section in which 15.7% of the households were Black in 1960, was assigned to Edison school. In 1959, Edison was 13.4% Black, while only 7.5% of all students in the district were Black. The second section of the old Harding School attendance area, in which less than 2% of the households were Black, was not assigned to any one school, but made an optional attendance zone. Students could attend Edison, McKinley, which was 1.2% Black in 1959, or Vine, which was 1.4% Black in 1959.

While the board might have assigned the optional zone definitely to any one of the three schools, its assignment to Edison would have assigned students from a relatively White area to a relatively (for the time) Black school. Its assignment to Vine or McKinley would have been to assign relatively White areas definitely to White schools, while the relatively Black area had already been definitely assigned to the relatively Black school. In this situation, the choice of an optional attendance zone improved the appearance but had the effect of allowing the Whites in the optional zone the opportunity to *opt out* of Edison and select Vine or McKinley, each of which had fewer Black children. As Dr. Michael J. Stolee concluded, this optional attendance zone "is perhaps the classic use of an optional zone in determining the racial enrollments in schools. . ." [31]

Dr. Stolee also stated that three actions taken together – (1) the assignment of that portion of Harding School which had Black residents to Edison, (2) the establishment of the optional attendance zone, and (3) the location of a portable building at the nearby predominantly White Washington school, while there was space available at Edison – indicated that the school authorities had designated Edison as a "Black" school.[32] The court finds that the Kalamazoo board was purposely confining Black elementary children in the south central portion of the city to Edison school.

The school board also created optional attendance zones for some junior high school students. One, between Hillside and Lincoln Junior Highs, was created about 1959 and terminated about 1965. Had the optional zone not been created the students apparently would have been assigned to Lincoln. The purpose and effect of the zone was to allow Whites to avoid attending predominantly Black Lincoln and to attend instead relatively White Hillside. [33]

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[31] Stip. #12, p. 5, nos. 15, 16, 18; p. 3, no. 10. Testimony of Dr. Michael J. Stolee, qualified as an expert in educational administration, school segregation and school desegregation, Tr., X, 1805-1808, and quoted, 1805; XI, 2101-2103.

[32] Testimony of Dr. Stolee, Tr., XI, 2102-2103.

[33] Pl. Ex. No. 1522A. Testimony of Dr. Stolee, Tr., X, 2117-2118.

In 1965, Lincoln Junior High was abolished (although Lincoln elementary remained), and some of the Black students were reassigned to South Junior High. An optional attendance zone had been created in 1959 between South and Milwood Junior Highs in a largely White area. With the increased number and proportion of Blacks at South in 1965, the decision to continue the optional zone was very significant. Although the White students might have been assigned to Milwood, the retention of the optional zone improved the appearances, but again had the effect of allowing White students to opt out of relatively Black South in favor of largely White Milwood. [34]

In other instances, the Kalamazoo board's change of boundaries had the long term purpose and effect of confining Black students to a predominantly Black school. In 1947 and 1953, the board adjusted the boundary between disproportionately Black Roosevelt and virtually all White Wilson elementary schools. While the immediate short term effect of these changes was to insignificantly dilute the Black proportion of Roosevelt, the more significant and clearly predictable long range consequence was to assure that Blacks entering this racially changing area would still attend Roosevelt. [35]

The Kalamazoo attendance boundary policies cannot be fully understood except in relation to the equally important matters of new school construction and attendant site location policies, especially in the 1950's and 1960's. Kalamazoo was growing in the early 1950's, and the existing Kalamazoo facilities were becoming severely strained. In March 1954, the Kalamazoo Public Schools published their projected school housing needs until 1960-61. [36] The document reveals comprehensive analysis of the apparent future need for new classrooms and schools, and was obviously intended to be in the nature of a long range plan. It was not, however, rigidly adhered to. While some of the detailed proposals were

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[34] Pl. Ex. No. 1522A. Testimony of Dr. Stolee, Tr., X, 2118.

[35] Stip. #12, p. 4, nos. 11-13. Testimony of Dr. Stolee, Tr., X, 1800-1803; XI, 1948-1954.

[36] Doney, "What About 1960?" Kalamazoo Public Schools, Department of Research and Guidance, General Information Bulletin No. 195 (1954), Pl. Ex. 223.

later implemented, some were not. [37]

The determination of the location of schools is a very important function of local school authorities.[38] Over the long run, the consequences of choice are far-reaching to all affected. Thus, site selection is ordinarily a complicated affair, ultimately implicating the major dynamic forces in the community. In the community of Kalamazoo, responsible school authorities informally receive a great deal of advice from private individuals and interest groups. The school board also established formal, public contacts with the rest of the community through citizens' advisory committees and formal consultations with private groups.

In the late 1950's and the early 1960's, the Kalamazoo board regularly consulted with public citizens' committees on various aspects of the problems of locating and constructing new schools and remodeling old ones. [39] Since the advice of these committees was not always followed, and since official minutes usually do not reflect full discussion or debate, the minutes and committee reports cannot be said to accurately reveal the true reasons

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[37] See Stip. #12, p. 8, nos. 25, 26; #12, p. 10, no. 34.

[38] The primary authority to locate schools is given by statute to the local boards. M.C.L.A. Sec. 340.113; M.S.A. 15.3113. All plans and specifications for the construction or remodeling of any school building or addition must have the approval of the State Board of Education or its agent. M.C.L.A. Sec. 388.851; M.S.A. 15.1961. The statute directs the State Board to consider matters of health, fire and safety. Between 1949 and 1962, the Superintendent of Public Instruction was also required to consider the "adequacy and location" of a school site. Mich. Public Acts of 1937, Act. No. 306, Sec. 1, as amended by Mich. Public Acts of 1949, Act. No. 231. The provision requiring the Superintendent to consider the adquacy and location of school sites was repealed by Mich. Public Acts of 1962, Act No. 175.

[39] Stip. #12, p. 16, no. 60. Educational Planning Committee For Kalamazoo Elementary Schools, "Report" (1956), Pl. Ex. 231. This Report did not concern the location of new schools. Kalamazoo Citizens Committee for Public Schools, "Recommendations," in Kalamazoo Gazette, Apr. 11, 1956, at 8, Pl. Ex. 1600. The Recommendations did concern the amount and location of new school constructions, but were rejected by the school board. Pl. Ex. 1565. Kalamazoo Board of Education, "The Public Schools of Kalamazoo: A Report to the Community," at 3 (Nov. 11, 1957), in Kalamazoo Gazette, Nov. 11, 1957, Def. Kalamazoo Board of Education [KBE] Ex. 966. Kalamazoo Public Schools, "Report of the Citizens Committee to Study Educational and Housing Needs" (Sept. 1963), Pl. Ex. 256.

for the board's selection of particular locations.

In the middle 1950's, the Kalamazoo Board of Realtors was one private interest group with which the Kalamazoo Board of Education established an especially close relationship on the matter of school site selection and new school construction. Apparently this was in part a manifestation of a traditional policy, since there is evidence that the school board consulted with leading realtors on these matters as early as the late 1920's.[40] In June 1955, Superintendant of Schools Loy Norris wrote to the Chairman of the Kalamazoo Board of Realtors proposing that the Public Schools and the Board of Realtors jointly "develop a policy" concerning school sites in the new residential developments. The letter said, in part:

> "You perhaps are aware it is frequently the case that a new school opens up an entire new development in residential construction. I am wondering whether we could not develop a policy between us and the Real Estate Board whereby you would actually provide for a school site in a new development and get in touch with us to ask whether or not we would be interested in securing the site. As it now is, and has been in the past, developers often feel that we are a considerable nuisance – and maybe rightly so – when we insist upon buying the site in the new development. It is said that building a school will devaluate adjacent residential property. Also, when a new development opens we find it necessary to pay two or three times what the developer paid for the property when it was opened up. This is tax money which comes from you people as well as from your fellow citizens." [41]

The Board of Education also thought that cooperation with the realtors would be desirable, and requested the Board of Realtors to appoint a special committee.[42] Mr. David R. Satin, then President of the Board of Realtors, appointed a committee, which became known as the School Sites Committee, to meet with the

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[40] See Stip. #13, p. 3, no. 7.

[41] Pl. Ex. 459.

[42] Pl. Ex. 1805, 1562.

school authorities.[43] One such meeting was held at the Elks Temple.[44] Although the School Sites Committee was at first apparently to consult only on school construction in new residential areas, the Committee soon offered its services in conjunction with school site problems generally.[45] In the late 1950's, the Kalamazoo Board of Realtors and its Committee also offered their favorable opinion on the suitability of a site for a new administration building,[46] their unfavorable opinion on the proposed site for a new library,[47] and their advice on appraising and the mechanics of purchasing school sites.[48] Subsequently, in a manner to be explained more fully below, the Board of Education went into an extraordinarily close relationship with Mr. David Satin, former President of the Board of Realtors, in the development of the Arcadia section in the southwestern part of the school district.[49]

The position of the real estate industry on the general issue of open housing since World War II is a matter of public record, and has been summarized, with reference to supporting exhibits, in the stipulations by the parties.[50] The Code of Ethics of the National Association of Real Estate Boards, Art. XXXIV, included in Kalamazoo Board of Realtors, By-Laws, Code of Ethics and Multiple Listing Regulations for both 1945 and 1950 provided:

> "A Realtor should never be instrumental in introducing into a neighborhood a character of property or occupancy, members of any race or nationality or any individuals whose presence will clearly be detrimental to property values in the neighborhood."[51]

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[43] Pl. Ex. 462, 464.

[44] Pl. Ex. 460, 461.

[45] Pl. Ex. 1329, 1803.

[46] Pl. Ex. 457; Stip. #7, p. 8, no. 4.

[47] Pl. Ex. 465, 468.

[48] Pl. Ex. 454, 463.

[49] Stip. #7, pp. 9-10, nos. 8-10.

[50] Stip. #7.

[51] Stip. #7, p. 5, nos. 16, 17; Pl. Ex. 413, 414.

While the race and nationality parts of the Code of Ethics were removed after 1950, the exact date of which is unknown, [52] the real estate industry has consistently allied itself with those private persons and property owners who wished to discriminate on the basis of race in the sale or rental of housing and has consistently opposed any legislation or other public measures which would affect the operation of the private market in such a way as to reduce segregated housing in Kalamazoo or elsewhere.

The Kalamazoo Board of Realtors represented only one dynamic force among many in the community which ultimately affected school board decisions on the selection of sites and the construction of new schools. However, the court finds that the association between the two groups has probative value in assessing the actions of the Board of Education in the 1950's and 1960's. In the community of Kalamazoo, the school authorities, including the members of the school board, were certainly aware of the position of the Board of Realtors and many individual realtors concerning measures which would operate in a practical way to reduce segregated conditions in Kalamazoo. Where the foreseeable and actual effect of the school construction program of the 1950's and 1960's was to contribute substantially to the creation and maintenance of segregated schools and neighborhoods, the school board's close association with a private group such as the realtors must be considered in evaluating the results of the school board's actions.

On June 1, 1956, the Kalamazoo voters approved a millage and bond issue totaling nearly $15,000,000 and permitting a continuing program of construction in the Kalamazoo School District. [53] One of the areas affected by the new construction was the northern section, referred to in the testimony as a "pie", [54] which contained most of the Black elementary schools in the district and which was served, in the late 1950's by three elementary schools, Lincoln, Woodward and North Westnedge. The boundaries in this area had remained relatively stable since 1945.

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[52] Stip. #7, p. 5, no. 18.

[53] Stip. #12, p. 16, no. 59.

[54] Testimony of Dr. Stolee, Tr., X., 1793.

In 1959, Lincoln was 62.2% Black, Woodward was 1.3% Black, and North Westnedge was 22.1% Black. [55] The attendance zones of Lincoln and North Westnedge wery rectangular, with the elongated portion running in a north-south direction. This was true to a lesser extent of Woodward. North Westnedge was ole and thoroughly inadequate by the late 1950's and had to be phased out.

The school board, apparently following a detailed recommendation of Superintendent Norris, [56] built a new school, Northglade, at the northern border of the district almost due north of old North Westnedge school. Northglade was opened in 1959 and North Westnedge closed by 1962. [57] In conjunction with the opening of Northglade and the establishment of boundaries for that school, new boundaries were set for Woodward and Lincoln. [58] Northglade was given rectangular boundaries, with the elongated part running east and west. Northglade took about the north one-half of Lincoln, the north two-thirds of old North Westnedge, and a northerly sector of Woodward. [59] Although precise racial statistics are not available for 1959, it appears that these and other boundary changes inside the "pie" area operated to reduce Black and White racial concentrations in Lincoln and Woodward. In 1959, 26.3% of the households in the Northglade service area were Black, [60] so it is reasonable to infer that Northglade was racially identifiable when it opened.

The court concludes that the net effect of the closing of North Westnedge, the location, construction, and opening of Northglade, and the accompanying boundary changes was to greatly fortify the unaltered exterior boundary of the combined Lincoln-Northglade-Woodward attendance area, especially on the western side. The foreseeable and actual effect of this phase of the Kalamazoo program was to contain the future growth of Black

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[55] Pl. Ex. 285.

[56] Norris, "School Sites That Will Be Needed," June 18, 1956, No. 4, Pl. Ex. 467.

[57] Stip. #12, p. 6, no. 21-22.

[58] Id.

[59] Id.

[60] Stip. #12, p. 6, no. 21.

elementary student population on the north side in these three schools. By 1969, Woodward was 53.8% Black, Northglade was 87.2% Black, and Lincoln was 95.6% Black.[61]

Indeed, as Dr. Stolee testified, there was "no compelling reason" why Northglade had to be constructed where it was.[62] Locating the school within the same rigid boundary line, in Dr. Stolee's words, "almost guaranteed the continuing racial identifiability" of Northglade.[63] Furthermore, the shifting of boundaries within the Lincoln-Northglade-Woodward area could make no difference in the long run, since cutting the pie into three pieces in almost any direction would result in three racially identifiable schools.[64] The reduction in racial concentrations at Lincoln and Woodward in 1959 was of only temporary and marginal significance.

The court notes that the Kalamazoo board was not simply replacing North Westnedge with Northglade, but that there were many rational alternatives presented to the board by the extensive construction projects in the area. Slightly more than two miles to the west of Northglade, the school board also built the new Indian Prairie elementary school in 1959. Predictably, Indian Prairie was predominantly White when it opened, and it has remained predominantly White.[65] The board also opened Winchell, another predominantly White elementary school, in 1959 in the southwest section of the district.[66] As Dr. Stolee suggested,[67] these projects afforded numerous opportunities in the late 1950's for changes in attendance zones which would not have had the effect of perpetuating segregation.

The court finds that the school board, unchecked by the supervisory authority of the State Board of Education, inten-

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[61] Stip. #12, p. 2, no. 9.

[62] Tr., X, 1794.

[63] Id., 1795.

[64] Id., 1794.

[65] Stip. #12, p. 18, no. 70. Indian Prairie was in a section which had been annexed in 1947. Stip. #10, p. 6, no. 29. No. 10, p. 32.

[66] Stip. #10, p. 5, no. 22.

[67] Tr., X, 1795, 1797-1798.

tionally created, maintained and perpetuated segregated schools in the north and northwest areas by deliberately pursuing construction and boundary policies which resulted in confining Black elementary students to the Woodward-Northglade-Lincoln area, and which at the same time resulted in creating and preserving the Indian Prairie school and attendance area for an overwhelmingly White student body. In the language of *Keyes, supra,* the Kalamazoo board located both Northglade and Indian Prairie with "conscious knowledge" that they would be segregated schools. 303 F. Supp. at 285; 41 U.S.L.W. at 5005.

The Kalamazoo Board of Education not only confined Black elementary students to selected areas and schools, and acted to preserve other areas and schools for Whites, but it also became associated with a realtor in the development of a new, predominantly White, subdivision.

On December 2, 1957, it was reported to the Board of Education that Mr. David Satin was willing to sell a site of ten acres for use as a future building site for an elementary school in the Arcadia Plat he was developing. The Arcadia Plat was substantially underdeveloped in 1957. Mr. Satin was instrumental in establishing the Realtor's School Sites Committee and in fostering cooperation between the Board of Education and the Board of Realtors. The combined School Board-Satin project was apparently among the first practical results of the new intimate association.[69] After investigation, the School Board decided to buy the proffered lot for $20,000.[70]

In 1960, the Board of Education agreed with Satin's request that he be permitted to place a sign on the site, which would inform the people coming into the area that this was a future elementary school site.[71]

The developers also ran advertisements in the Kalamazoo Gazette designed to indicate to prospective buyers that Arcadia

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[68] Pl. Ex. 1789. Stip. #7, p. 9, no. 8.

[69] Pl. Ex. 1792.

[70] Pl. Ex. 1790, 1791, 1793. Stip. #7, p. 9, no. 8.

[71] Stip. #7, p. 10, no. 9. Pl. Ex. 1511, 1802.

was intended to be mostly White. Arcadia was represented as being "Refined – a refined neighborhood for fine people," and "Discriminating – yes, discriminating buyers will stop looking after seeing the display homes in Arcadia priced from $23,900 including large lot." [72] Later, the developers also ran ads in the Kalamazoo Gazette informing the public that the new homes for sale were located near the new Arcadia elementary school. [73]

With considerable help from the FHA, [74] Mr. Satin sold so many homes in Arcadia that the new elementary school had to be built very soon. [75] It opened in 1964, and because of further growth, additions were made in 1965, 1966 and 1969. Relocatable classrooms were added in 1969 and 1970. [76]

Arcadia School opened as a predominantly White school in 1964. (Although precise racial figures for 1964 are not available, the 1967 statistics indicate that Arcadia had only 5 Black students out of a total of 313, or about 1.6%). [77] While there is evidence in the record to indicate that the school board had cost considerations in mind when it purchased the Arcadia plat, [78] these con-

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[72] Kalamazoo Gazette, July 23, 1963, at 57. Pl. Ex. 1869. See also Kalamazoo Gazette, July 21, 1957, at 47, promising a "proven and highly desirable neighborhood." Pl. Ex. 1868. There is no evidence in the record that Mr. Satin or his associates ever refused to sell home or lot in the Arcadia Plat to a prospective Black buyer.

[73] Pl. Ex. 1867, 1870.

[74] The FHA was definately involved in the early development of Arcadia. It is estimated that the FHA became involved in the early 1960's with about 90% of the mortgages being underwritten in the Arcadia and Arcadia #1 Plats. Letter from Mr. Alfred Raven, Director, Grand Rapids Insuring Office, Federal Housing Administration, Department of Housing and Urban Development, to Howard and Howard, Attorneys, Aug. 13, 1973, added to evidence by Stipulation of the parties filed Sept. 17, 1973.

[75] Kalamazoo Public Schools, "Administration Priorities Regarding Building Needs," Dec. 5, 1963, listed as the first priority the building of a new elementary school on the Arcadia Site. Pl. Ex. 258. Early in 1964, Dr. Percy, the Superintendent, remarked at a Board of Education meeting that he was amazed at the number of new homes being built around the Arcadia site because of the new facility to be built there. Stip. #7, p.10, no. 10; Pl. Ex. 259.

[76] Pl. Ex. 1887.

[77] Pl. Ex. 286.

[78] Pl. Ex. 1792, 1793.

siderations were apparently cast aside when the board allowed Satin to publicly exploit the planned school for the purposes of speeding development.

Nor since the board assisted in the Arcadia service area, can it be credibly claimed that the board was merely erecting another school to service a pre-established neighborhood. Moreover, the board members must have been aware that the neighborhood they were helping to create would be predominantly White. Geographically, the Arcadia plat was far removed from any area of substantial Black population, with Western Michigan University being between Arcadia and the center of Kalamazoo.[79]

The board's Arcadia project was an outgrowth of close association between the school board and the Board of Realtors, whose public stand in favor of discriminating property owners and against any effective, affirmative state or local action which would open the real estate market to Blacks was well known. Mr. David Satin ran careful advertisements to indicate that the neighborhood and its neighborhood elementary school, were intended to be predominantly White. The new Arcadia homes sold for $23,900, and up, a relatively high price for the early 1960's. In such circumstances, the Arcadia development could not fail to draw relatively affluent Whites away from older, central areas of Kalamazoo.

Thus, in light of all the entire relevant history surrounding Arcadia, the court concludes that the school board intended that Arcadia elementary school be opened as a predominantly White school. The circumstances surrounding the planning and construction of Arcadia school show that the Kalamazoo Board was not only acting to perpetuate the segregated character of Kalamazoo schools, but was also intentionally acting in such a way as to promote and create a segregated residential pattern. When the school board combines with real estate developers in such a way as foreseeably and actually to create a new predominantly White neighborhood school, it cannot be heard to say that it is merely applying a racially-neutral neighborhood school policy throughout the district.

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[79] On the census tract maps, e.g., Pl. Ex. 1672, an area to the east of Arcadia appears as having a Black population of from 5% to 24.9% of the total. However, this is the state hospital, not a residential area.

The whole pattern of construction of elementary schools in the north, northwest, west and southwest in the late 1950's and early 1960's may be considered as a whole. Northglade was built in a transitional area, was opened in 1959 as a racially-identifiable school, and by 1969 had become 87.2% Black. All other schools built in the north to southwest arc during this period were in predominantly White neighborhoods, which remained predominantly White in 1969: Indian Prairie (1959), Grand Prairie (1958), Arcadia (1964), Winchell (1959), Oakwood (1963). Viewing these facts in light of the particular circumstances recounted above and in light of the general rigidity of school boundaries in Black residential areas, the court concludes that the Kalamazoo Board of Education deliberately pursued the policy recognized as a foreseeable possibility in *Swann, supra,* of building many new schools:

> "[I]n the areas of white suburban expansion farthest from Negro population centers in order to maintain the separation of the races with a minimum departure from the formal principles of 'neighborhood zoning.' *Such a policy does more than simply influence the short-run composition of the student body of a new school. It may well* [and did in this case] *promotc segregated residential patterns which, when combined with 'neighborhood zoning,' further lock the school system into the mode of separation of the races.*" 402 U.S. at 21. (Emphasis supplied.)

The findings thus compelled by the record on this subject, therefore, at least parallel and probably exceed the observation of the Sixth Circuit Court of Appeals, affirming the District Court's findings of state responsibility for school segregation in Pontiac, Michigan, "that school location and attendance boundary line decisions, for the past 15 years, more often than not tended to perpetuate segregation." *Davis, supra,* 443 F.2d at 576.

Other aspects of the Kalamazoo board's construction policies, when coupled with the general policy of maintaining rigid boundary lines in Black residential areas, contributed to the creation, maintenance and perpetuation of segregated conditions in Kalamazoo elementary schools. When population pressures were felt within a school service area, the board often added permanent classrooms, or after 1966-67, portable classrooms.

The school board followed a policy of using permanent and portable classrooms in both Black and White schools, with the net effect of retaining Blacks in the Black schools and Whites in the White schools. Thus, a part of Kalamazoo's construction program in the late 1950's was a virtual rebuilding of Edison School. Edison had been originally built in 1880, and many additions had been made, including substantial ones in 1889 and 1923. The older part of Edison was razed in 1958 at the direction of the Fire Marshal. The addition of twenty-two classrooms in that year brought Edison's total capacity up to thirty-one. With a student population of 13.9% Black in a school district 7.5% Black, Edison was racially identifiable in 1959, and has remained disproportionately Black, having the fifth highest concentration of Black elementary students in the district. Despite the fact that most other elementary schools built in the late 1950's were designed to conform to a standardized size of thirteen classrooms, Edison was constructed sufficiently large – more than twice the size of the standard – to house all of the students living in the only attendance zone in the city's southeastern side containing significant numbers of Blacks.[80] The further addition of four classrooms in 1969[81] simply augmented the effect of the board of education's construction policy at Edison. Blacks living in the old Edison area were contained in the Edison school, while contiguous schools to the immediate west, south and east were maintained as disproportionately White.

Edison's 35 classrooms are situated on a site of only 7.22 acres which is shared with a Boys Club facility and a school district maintenance building. The size of this site is roughly equivalent to the size of sites entirely available to schools approximately one-third as large as Edison.[82]

Lincoln School, which has the highest proportion of Black students of any school in the system, was frequently remodeled and maintained, often at the direction of the Fire Marshal, in order to keep its 52 classrooms available for inner city Blacks.[83]

[80] Stip. #12, p. 16, nos. 61, 62.

[81] These and other figures relating to the construction and installation of classrooms are principally from Pl. Ex. 308, 1887.

[82] Stip. #12, p. 17, no. 63

[83] Stip. #12, p. 20, nos. 76-78.

Northglade School, 79.5% Black by 1967, received four portable classrooms in 1967 and 1970 to supplement its thirteen previously constructed rooms. Woodward, the third blackest school, also the object of remodeling inspired by the Fire Marshall, was expanded to 28 classrooms in 1961 in order to house growing population within its attendance zone.

The use of additions to reinforce old segregation-producing attendance zone boundaries was not confined to Black schools. For example, the record shows that the board added permanent or portable classrooms to predominantly White schools at times when there were vacancies in disproportionately Black schools. Dr. Stolee testified that after space became available at Edison, an elementary school which had a higher proportion of Black students than the proportion of Black students in the whole system, the school board added a relocatable classroom at nearby relatively White Washington rather than change boundaries.[84]

Dr. Stolee further testified that his examination of school board records revealed that there were never less than 1,057 vacant spaces in Lincoln, Northglade, Roosevelt and Woodward Schools during the years 1961 to 1970, and sometimes more than this number of vacancies.[85]

While the court agrees with the defendants that the precise number of vacant spaces is difficult to determine, it appears that at all times from 1961 to 1970 there were a substantial number of vacancies in the four downtown schools.[86] The board's addition of permanent and portable classrooms to White schools while there was a significant amount of space in racially identifiable Black schools had the obviously foreseeable and actual effect of perpetuating the segregated conditions which prevailed.

The Kalamazoo board also operated several "primary units," small buildings designed to accomodate only the lower elementary grades, kindergarten through third.[87] At least three of these

[84] Tr., XI, 2103.

[85] Tr., X, 1774. Pl. Ex. 1866.

[86] See also Pl. Ex. 315, 316, 317.

[87] Stip. #12, p. 15, no. 54.

units, Peter Pan (1955), Pleasant Park (1958), and Fairview (1960), were erected by the board within existing attendance zones along the White outer periphery of the district to relieve overcrowding. Each remained virtually all White throughout the period of its use up to 1970.[88] Once again, the positioning and use of these new facilities effectively obstructed the intermingling of Black and White students. By locating relief classrooms for overcrowded White schools in this manner, the Kalamazoo board preserved the White character of the schools affected.

While the Kalamazoo board has contended that many of the additions accomplished the result of bringing inadequate annexed schools up to the Kalamazoo district's standard size of 13 classrooms, the record reveals a disturbing number of instances wherein this goal was applied inconsistently. The board's approach to Edison provides but a single example. Arcadia school, newly built well after the standard size facility had been targeted, received 4 additional protable classrooms even after permanent construction of 14 classrooms. Chime, a White school serving such a wide attendance area as to negate even the most expansive definition of a "neighborhood" school, received additions elevating its capacity to 17 classrooms by 1964. Installation of two more portable rooms in 1969 and 1970 further expanded the size of Chime.[89]

Also indicative of the inconsistency of the board's effort to achieve the standard 13 classroom size for its elementary schools is the pattern of development of virtually all White Washington school. Originally built in the early 1920's as a rather large school, capable of absorbing junior high as well as elementary pupils, Washington received an addition in 1963, leaving it with 25 classrooms. Notwithstanding the fact that this resulted in a school twice the standard size, Washington was further enlarged by installation of a portable classroom in 1966.

Of course, individual decisions to adjust to population trends and educational needs by installing facilities on existing school sites cannot, of themselves, be objectionable. However, a persistent pattern of instituting major adjustments in a way which ne-

[88] Stip. #12, p. 14, no. 53(a).

[89] Pl. Ex. 308, 1887.

cessarily fortifies barriers to the intermingling of the races is worthy of careful scrutiny by this court, in light of the severe educational detriments which flow from a racially segregated learning environment.

The final aspect of the board's construction record which bears consideration relative to its elementary schools is the physical comparability of these facilities. Of the five black schools, only one, Northglade, really compares favorably to many of the facilities attended predominantly by White children. This was a reasonably foreseeable consequence of the board's actions and inactions and, therefore, intentional.

The oldest elementary school building in Kalamazoo is Roosevelt, which still stands essentially as it was constructed in 1909. In 1969 Roosevelt was the district's fourth blackest school, with 38.8% Black students. Woodward, serving a 53.8% Black student body in 1969, was originally built in 1921, one year earlier than Lincoln. Both Woodward and Lincoln have been the object of repeated concern on the part of the Fire Marshal, as discussed previously. While several predominantly White schools also date back to the 1920's, they generally, with the exception of Washington, do not contain the large number of classrooms found in these Black schools. Edison school is another school with a history of substantial Black attendance which is disproportionately large relative to most other elementary facilities in the district.

Kalamazoo board member, Edward Thompson, perhaps provided the most accurate summary of the board's boundary and construction policies: "We all know what the results were. The results were that the old schools were left to the Blacks."[90]

Like most school systems, Kalamazoo has always had fewer junior high schools than elementary schools. The story of the development of Kalamazoo's junior highs since World War II is accurately summarized in the stipulations.[91] In 1945-1946, Kalamazoo Public Schools operated five junior high schools in facilities

[90] Deposition of Edward Thompson.

[91] Stip. #12, pp. 23-28, nos. 90-110. The following discussion is built on these stipulations, except where otherwise noted.

which also served elementary students. From 1946 onward, the Kalamazoo Public Schools followed a general policy of establishing separate facilities for secondary school students, and embarked on a program to modernize their junior high schools. With the development of standards and criteria for location and original construction of junior high facilities, no consideration of racial student body composition was made.[92] South Junior High was opened in January 1951 in the south central portion of the district. Northeastern was opened in 1953. Hillside, in the northwestern section of the district, opened in 1959. Milwood School, in the southeastern portion of the district, was a combined elementary junior high when it was annexed in 1956.

Subsequently, in 1959, the new Milwood Junior High was opened. Oakwood, in the southwestern portion of the district, was annexed in 1957. The annexed Oakwood Junior High was small, and from 1957-1959 contained a few elementary classes. In 1959, a greatly expanded Oakwood Junior High was opened, and with the opening of new elementary schools in the area in the same year, the school became devoted exclusively to junior high use.[93] Aside from additions at Northeastern and Oakwood in 1966, the junior high construction program was completed by 1959.[94] In 1959, Northeastern was 9.6% Black; Hillside, 1.8% Black; Oakwood, 100% White; Milwood had 1 Black student; South was 2.6% Black.[95]

With the opening of Milwood in 1959, Lincoln became the only combined elementary junior high facility and the only junior high not built and equipped according to the modernized standards held by Kalamazoo Public Schools. It had 18 junior high

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[92] Stip. #12, p. 23, no. 92.

[93] Stip. #10, p. 5, nos. 23, 24. Stip. #12, p. 24, no. 98, Pl. Ex. 327.

[94] Pl. Ex. 1887.

[95] Pl. Ex. 285.

classrooms,[96] serving 315 junior high students in 1959.[97]

In 1960, the Fire Marshal found Lincoln School to be in need of considerable fire safety work.[98] The school district decided to remodel the Lincoln Junior High School to meet fire safety requirements necessary to maintain the junior high and elementary facility at Lincoln in the years 1961-1964.[99] Other educational and physical deficiences at Lincoln were perhaps even more serious. A Citizens Committee reported in September 1963:

> The caliber of instruction in the courses offered at Lincoln is equal to that of the other junior high schools but because of the limited enrollment, students are deprived of the variety of offerings available at the other junior highs. Library facilities are limited and are shared with the elementary school. There is no foreign language program. Offerings in mathematics are extremely limited. Ninth grade algebra is not available every year. The number of elective subjects is also limited. There is only one counselor for the entire student population. This should not be so in an area where counseling is greatly needed. * * *
>
> Lincoln is the only junior high school without cafeteria facilities - an area where, perhaps, they are needed the most. The playground is too small and is shared with the elementary school, creating an undesirable situation.
>
> The Citizens Committee is, therefore, convinced that the students attending Lincoln Junior High School do not and cannot under extreme conditions receive an adequate junior high school education.[100]

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[96] Stip. #12, p. 26, no. 102. As a temporary expedient in the early 1960's Hillside Junior High's facilities were used for a primary unit. Stip. #12, p. 27, no. 108.

[97] Pl. Ex. 992(a). The junior high enrollment at Lincoln during 1960 was 294; 1961, 296; 1962, 314; 1963, 290; 1964, 181 in grades 7 and 8 only. Id. Lincoln Junior High was discontinued in 1965, although Lincoln Elementary remained. See, for total enrollment at Lincoln during the 1959-1964 period, KBE Ex. 992.

[98] Stip. #12, p. 26, no. 104.

[99] Stip. #12, p. 26, no. 105.

[100] Kalamazoo Public Schools, "Report of the Citizens Committee to Study Educational Housing Needs," 21-22 (Sept. 1963). Pl. Ex. 256.

The Committee recommended that the junior high programs at Lincoln be discontinued.[101] This was finally done in 1965. The Lincoln Junior High students were transferred to Hillside and South.[102]

It appears to this court that the Kalamazoo Board of Education deliberately confined the Lincoln junior high students, a substantial portion of whom were Black, to substandard Lincoln facilities and to a substandard educational program from 1958 or 1959 through 1964, when standard facilities were at all times available. South Junior High had been constructed in 1951, and Hillside was completed in 1958. Kalamazoo's junior high building program was completed in 1959, and there was no more significant expansion between 1959 and 1965. Substantially all the facilities which were available in 1965 were available in 1959 or earlier. Thus, the Kalamazoo Board of Education deliberately denied these students equal educational opportunity and equal protection of the laws within the meaning of the Fourteenth Amendment.

Central was the only high school in Kalamazoo when it became apparent in the 1950's that an additional senior high would be needed. It was understood that a substantial portion of the 1956 bond issue would be devoted to the new school.

Selecting a site was a problem. Some consideration was given to Lincoln School, which had originally been built in 1922 to permit its use as a high school.[103] Perhaps a better option was Upjohn Park which was located in the central southeastern portion of the district and which was available as a possible site for a senior high school.[104] In 1959, Upjohn Park contained baseball and football fields and a field house building in which athletes changed their equipment, and was used for varsity athletics. This site was also considered as a possible location for the new high school.[105]

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[101] Id. at 22.

[102] Testimony of Dr. Stolee, Tr., X, 1743.

[103] Stip. #12, p. 29, no. 2.

[104] Stip. #12, p. 29, no. 3.

[105] Testimony of Mr. Maynard Morgan, Tr., XVII, 2454-3455.

However, attention was finally focused on the far south side of town, with consideration being given to several sites in that area. The ultimate choice was a far south side site of 55 acres.[106] Since the site was located outside the city limits, it had to be annexed. In contrast to the centrally located Upjohn Park, the selected site was very far from significant concentrations of Black population.

If the far south side site was chosen by the Kalamazoo board with the intention that those living nearest to the new Loy Norrix High School would go there, while those living nearest to Central would continue to go there, then the board clearly intended that the new high school would be predominantly White.[107] Students were permitted to select either Norrix or Central High School in 1960. Most students from the elementary areas containing Black students selected the more accessible Central High School.[108] When attendance boundaries were established in 1961, students residing in all but one (Edison) of the attendance areas of the Black elementary schools were assigned to Central.[109]

Hence, although no specific racial census data is available for 1961, the inference is inescapable that Loy Norrix became a virtually all White school, while Central came to house the bulk of the Black high school student population.

In 1967, the time of the first racial census of record after the opening of Loy Norrix, Central was 15.4% Black, while Norrix was 1.8% Black. In 1969, Central's student body was 19.7% Black compared to Norrix's 1.6%.[110] During this period of the sixties, the parties have stipulated that "Central High School was overcrowded and seen as inadequate by school officials and citizens despite efforts to make its facilities equal to those at Norrix."[111] There is no indication that the school board gave for-

[106] Stip. #12, p. 29, no. 4.

[107] See testimony of Mr. Maynard Morgan, Tr., XVII, 3456-3459.

[108] Stip. #12, p. 29, no. 5.

[109] Stip. #12, pp. 29-30, no. 6.

[110] Pl. Ex. 286, 288.

[111] Stip. #12, p. 30, no. 7.

mal and public consideration to a positive program to reduce racial concentrations in the two high schools before 1965.[112] The court concludes that the foreseeable and actual effect of constructing Loy Norrix in the extreme south and of the drawing of the 1961 boundaries was to assure the overconcentration of Black high school students at the old and physically inferior Central High School.

The Kalamazoo Board of Education also contributed to the creation, maintenance and perpetuation of segregated schooling through its teacher hiring and assignment policies. In 1947, the Kalamazoo Board declared that its policy was to choose "all personnel on the basis of character, competence, and training, without regard to color, creed, or national origin."[113] However, by the 1967-1968 school year, only 21 individuals out of a total staff of 1,111, or about 2%, were Black. The proportion of Black staff gradually increased thereafter, rather sharply rising in 1969-1970 to 5%, and in 1970-1971 to roughly 7.5%.[114]

In each of the three years 1967 through 1969, Lincoln, Northglade, Woodward and Roosevelt, the four elementary schools having the highest proportions of Black students, contained approximately 85% of all Black elementary students and roughly 63% of all the Black elementary staff in Kalamazoo.[115]

In 1970, the last year preceding the desegregation effort, 80% of the Black students and 80% of the Black elementary staff were concentrated in these four schools. Broken down into figures for individual schools, the record shows a startling direct correlation between racial composition of student body and racial composition of faculty. In October of 1970, of the 30 Black certificated teachers employed at the elementary level, 14, or 46.7%, were as-

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[112] See Stip. #12, p. 31, no. 11, Stip. #5, p. 1-2, nos. 1-3.

[113] Pl. Ex. 707.

[114] Kalamazoo Public Schools, Personnel Division, untitled chart showing Black staff at each school during the school years 1967-1968 through 1971-1972, and total professional staff during each school year (Mar. 25, 1972), Pl. Ex. 1228.

[115] Id. The following discussion of teacher assignments is based on this exhibit (Pl. Ex. 1228) and enrollment figures, Pl. Ex. 286, 287, 288, 289.

signed to Lincoln, 7, or 23.3%, to Northglade, 3, or 10%, to Woodward, 3, or 10%, to Roosevelt, and 2, or 6.7%, to Edison. Hence, 29 of the 30 Black teachers (96.7%) were assigned to the five elementary schools containing 84.9% of the Black elementary students in the Kalamazoo school district.

A similar pattern was exhibited at the junior and senior high school level. South, Hillside and Northeastern, respectively, enrolled virtually all of the Black junior high students in 1970. 41% of the Black students attended South, 40% attended Hillside, and 14.3% attended Northeastern. Hence, of the five junior high schools in Kalamazoo, these three enrolled 95.3% of the Black pupils.

Likewise, 17 of the 18 Black certificated personnel at the junior high level, or 94.4%, were assigned by the Board of Education to these schools, and, just as was true with regard to the elementary schools, the more Black students at the school the greater was the number of Black staff assigned thereto. Similarly, with respect to the two high schools, Central held 92.7% of the Black students, and 85.7% of the Black high school staff.

This marked direct correlation between racial proportions of students and teachers at all levels of instruction and between all schools at a given level is so pronounced that defendants have not seriously attempted to disclaim that race was a strong factor in the assignment of teaching personnel in the Kalamazoo school district. Indeed, the Kalamazoo board has conceded that, especially during the 1970-1971 school year, Black teachers were deliberately assigned to those schools with a large number of Black children. [116] The alleged purpose was not to further segregate the schools on the basis of race, but rather to provide role models for Black children and to seek to increase communication and credibility of the system with Black students.[117] However, while it is important that Black students be given suitable role models, the

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[116] Deposition of Dr. John R. Cochran, former Superintendent of Kalamazoo Schools, Vol. I, at 64. Testimony of Mr. Edward E. Peterson, principal of Woodward School from 1965 to 1971, Tr., XIII, 2419, 2421.

[117] Deposition of Dr. Cochran, Vol. I, at 65. Testimony of Mr. Peterson, Tr., XIII, 2419-2420.

Supreme Court has made it clear that this consideration will not outweigh the detrimental effects of state imposed segregation.

School board practices in the area of faculty assignment can be included "among the most important indicia of a segregated system." *Swann, supra,* 402 U.S. at 18. Here, again, a consistent pattern of racial assignment of teachers has been recognized to be a substantial affirmative school board exacerbation of an existing condition of racial identifiability of schools. *Kelley* v. *Guinn, supra.* Hence, in determining a school board's constitutional responsibility for racial segregation, "the school district's obvious regard for race in assigning faculty members and administrators is a factor which may be considered." Davis, 443 F.2d at 476.

In the context of this case, where segregated schools existed in 1970 and before, and where the school board had intentionally made substantial contributions to the creation, maintenance and perpetuation of this segregation, the court finds that the deliberate assignment of teachers on a racial basis exacerbated the detrimental effects of state-imposed segregation and was itself a significant segregative act.

The state and local boards' conscious neglect and inaction in the face of obvious consequences for the Black children of Kalamazoo has significantly compounded the problem of racial segregation in the public schools. In *Brown I, supra,* decided in 1954, the Supreme Court stated that "in the North segregation in public education has persisted in some communities until recent years. It is apparent that such *segregation has long been a nationwide problem,* not merely one of sectional concern." 347 U.S. at 491, n. 6. (Emphasis supplied.)

In *Brown I,* the Supreme Court enjoined the enforcement of a Kansas statute which *permitted* but did not require the segregation of elementary schools in certain cities. 347 U.S. at 486, n. 1. State and local school authorities everywhere, including Kalamazoo, were thereby put on notice that the Supreme Court did not regard school segregation as a strictly Southern problem, and that it was unconstitutional for a state, as a matter of policy, to deliberately *permit* segregated public schools.

This court can perceive no essential difference between a

state statute which *permits* local authorities to segregate and a state policy, not expressed in a statute but deliberately pursued over a long period of time which has as its purpose and effect the permitting of local authorities to segregate schools.

Similarly, this court can perceive no difference between a local school Board which exercises an option to segregate under a statute, *Brown I, supra*, and a local board which by its deliberate acts and omissions creates or maintains segregated public schools.

In light of the clear notice and requirement of *Brown I*, where opportunities for positive action are presented, where the consequences of failure to act are clearly foreseeable, and where those consequences are significant contributions to the creation or maintenance of segregated schools, the failure to act is deliberate and intentional. Moreover, if the fabric of the law is to be preserved, if substance is to have meaning beyond form, if the promise of the Fourteenth Amendment is to be fulfilled, then the deliberate failure to act by either state or local authorities must itself be actionable in this court. Plainly, where public issues are framed and questions posed which bear directly on the quality of education, a deliberate negative response from school authorities or a deliberate omission to act, can affect the shape of subsequent circumstances just as materially as can affirmative decisions and action. State responsibility under the United States Constitution must logically be and is fixed in either context. (See Appendix A.)

Especially up to 1967, the Kalamazoo board's counscious neglect and failure to act when opportunities presented themselves contributed prodigiously to the growth and maintenance of segregated conditions in the schools. The evidence in this case, and most especially the testimony of Mr. Maynard Morgan, an administrator in the Kalamazoo school system for more than forty years, shows that since 1954, 68 school construction projects and 32 attendance boundary adjustments were made in Kalamazoo. Despite the fact that virtually every such project or alteration potentially afforded an opportunity to confront the inequities which inhere in a segregated situtation, defendants concede that at no time before 1966 did the board formally and publicly consider any program, or make any decision, or implement any policy designed to positively confront the problem of racial isolation in

the Kalamazoo public schools. [118] This failure to act was itself a deliberate decision to forego its opportunity to correct the existing segregated conditions and itself was a unconstitutional denial of equal protection of the laws.

Furthermore, the record shows that since 1945, 18 annexations to the Kalamazoo school district were arranged by the board. Each of these annexations added homogeneous White students to the district, and most necessitated boundary adjustments. [119] Although the board exhibited a rigid determination to leave unaltered the boundaries of the inner city attendance zones, deliberate failure to seize the opportunity for adjustment, during a time when changes were necessary anyway, intentionally contributed to the containment of Blacks downtown and intensified racial concentration.

The court has already noted that throughout the latter fifties and sixties, the board was busily engaged in school construction efforts around the geographic periphery of the district which provided facilities for White students. That the placement of these facilities affirmatively served to segregate Whites from Blacks has previously been observed. Equally as consequential, however, was the board's failure during this period to capitalize on classroom space at least potentially available downtown for the newly added White students. While, as noted above, the precise number of vacant spaces and classrooms downtown is difficult to determine, it appears from the testimony of Dr. Stolee that there were a substantial number of vacant spaces and classrooms downtown, and especially in Lincoln, Woodward, Northglade and Roosevelt Schools. Nevertheless, during this period, the Kalamazoo board authorized the new construction of Oakwood and Arcadia schools plus substantial additions at Vine, Washington, Burke, Chime, Grand Prairie, Lakewood, West Main and Winchell, all predominantly White schools. The record also shows that in the cases of Chime and Winchell at least, these additions were not necessary to bring the schools up to the standard size of thirteen classrooms. Furthermore, Superintendent William D. Coats conceded in his

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[118] Stip. #5, p. 1-2, nos. 1, 2, 3; Stip. #12, p. 31, no. 11.

[119] Stip. #12, p. 9, no. 28; Stip. #10.

testimony that from an educational point of view, there is nothing functionally significant or essential about this size. Hence, all of the construction in the annexed areas deliberately ignored the potential for encouragement of racial integration in the center of the district via creative use of facilities available there.

> "[T]here are may places still in this country where the schools are either 'white' or 'Negro' and not just schools for all children as the Constitution requires. In my opinion there is no reason why such a wholesale deprivation of constitutional rights should be tolerated another minute." Justice Hugo L. Black of the United States Supreme Court in *Alexander* v. *Holmes County Board of Education*, 396 U.S. 1218, 1222, 24 L. Ed.2d 41, 90 S. Ct. 14 (1969).

On October 3, 1966, the Kalamazoo Board of Education chose to forego another opportunity to alter the course of racial segregation in its schools. Before the board on that day was a resolution endorsing a public referendum to establish a Kalamazoo Housing Commission to consider open housing in the city. [120] After discussion on the public record, however, the board voted to take no position in the matter on the grounds that this was not an issue of educational relevance. For the same board to later contend, as it has before this court, that racial segregation in the schools of Kalamazoo is purely a product of residential patterns over which it has had no influence or opportunity to act is untenable. In the first place, as the court has previously found, school construction policies did palpably influence residential growth in Arcadia and elsewhere. Furthermore, however, the board may not establish uninvolvement in a problem merely by a self-serving proclamation to that effect. Faced with the opportunity to act, the power to exert some influence and the exclusive responsibility to provide equal educational opportunity, the Kalamazoo Board of Education was active in fostering segregation by the very virtue of the fact that it consciously and deliberately chose for itself a passive role.

The Kalamazoo board further magnified the consequences of and trend toward increasing racial segregation in the schools by

[120] Deposition of Edward Thompson at 165-166. This deposition was admitted into evidence.

failing, at least before 1967, to seek and obtain qualified Black personnel. The record is clear that even at present, minority teachers are severely underrepresented on the Kalamazoo staff, comprising merely 6% to 7% of that staff in a system containing nearly 20% Black students. Before the administration's active recruitment effort of the late sixties, however, the number of Black staff was virtually negligible.

The adverse impact which racial isolation has upon Black and White children in terms of unrealistic self-images and detrimental attitudes is only intensified by a conspicuous absence of Black adults in positions of leadership and respect. This paucity of Black administrators and teachers was certainly a foreseeable result of board policies and was attributable to board policies. The damaging effect on students in Kalamazoo of the board's deliberate inaction should be and is a matter within the purview of the Constitution, if that vital document is to be accorded substance.

In summary, the court has examined the Kalamazoo board's practices with respect to attendance zones, including the use of optional zones, site location, the construction of new schools, the addition of permanent and portable classrooms, annexations, and the hiring and firing of teachers. Although many of the attendance zone and construction practices have appeared to some to be innocent on their face, and although they have ostensibly been adopted for economic reasons, the court finds that they have been intentionally designed to result in the maintenance of segregated education.

The Kalamazoo School Board's acts of commission and omission clearly demonstrate that the Kalamazoo School Board's administration of the school system substantially contributed to and proximately caused the segregated condition which prevails in the system. From before 1955 through 1969, and into 1970, the Kalamazoo School Board followed a purposeful pattern of racial discrimination which has denied Black children equal protection of the law and violated their fundamental constitutional rights as citizens of the United States to be free from discrimination and to pursue equal educational opportunities. This constitutional violation is independent of and apart from any other state or private institutional acts of discrimination.

The court also finds that the Kalamazoo School Board's discrimination against Black children existed before and at the time of the May 7 school board action to desegregate its dual school system. The May 7 board was (according to the teaching of *Brown I, supra*, and *Brown* v. *Board of Education*, 349 U.S. 294, 99 L. Ed. 1083, 75 S. Ct. 753 (1955) /*Brown II*/, performing its constitutional duty by the creation and implementation of the May 7 integration plan.

III.

The Kalamazoo Board of Education has contended that segregated schools have resulted from segregated housing patterns. This assertion raises the issue of the causes of housing segregation, apart from school board action, and more specifically, whether the state and its agencies have made substantial contributions to the creation and maintenance of segregated conditions in Kalamazoo, particularly in their relation to segregated schools.

The roots of our present difficulties lie in the existence of slavery before the Civil War. In a "civilized" society, slavery required an elaborate system of rationalizations to support and justify its existence. Many people, North and South, believed that Blacks were inferior, sub-human and inherently unequal. (Appendix D.)

The Thirteenth Amendment, passed as a result of the Civil War, abolished slavery, and gave Congress the power to prohibit most discrimination, public and private, against Black people on the basis of race. Congress passed the Civil Rights Act of 1866 (42 USC § 1982) to, among other purposes, prevent private discrimination in dealings in real property. Unfortunately, this Act was not enforced until very recently. See *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 20 L. Ed.2d 1189, 88 S. Ct. 2186 (1968).

The Fourteenth Amendment prohibited state action which discriminated on the basis of race and thus denied equal protection of the laws.

In 1880, the United States Supreme Court in speaking of the Thirteenth and Fourteenth Amendments, stated in *Strauder* v. *West Virginia*:

> At the time when they were incorporated into the Constitution, it required little knowledge of human nature to anticipate that those who had long been regarded as an inferior and subject race would, when suddenly raised to the rank of citizenship, be looked upon with jealousy and positive dislike and that State laws might be enacted or enforced to perpetuate the distinctions that had before existed. *Discriminations against them had been habitual.* It was well known that in some States laws making such discriminations then existed, and others might well be expected. The colored race as a race, was abject and ignorant, and in that condition was unfitted to command the respect of those who had superior intelligence. 100 U.S. 303, 306 (1880). (Emphasis supplied.)

The Thirteenth and Fourteenth Amendments apparently were insufficient to bring equal rights in practice to Black people. The habits of mind which had existed before the Civil War persisted as vestiges of slavery, and many White people continued to regard Blacks as inherently inferior and treated them accordingly. These attitudes gave rise to a number of discriminatory practices, some public and some private, which themselves took on the character of vestiges of slavery.

Among the discriminatory practices which arose was that of attaching racially restrictive covenants to land. The courts in both the North and the South regularly recognized and enforced such covenants. Michigan law is replete with such cases: see *Parmalee* v. *Morris*, 218 Mich. 625 (1922); *Porter* v. *Barrett*, 233 Mich. 373 (1925); *Schulte* v. *Starks*, 238 Mich. 102 (1927); *Mrsa* v. *Reynolds*, 317 Mich. 632 (1947); *Northwest Civic Ass'n.* v. *Sheldon*, 317 Mich. 416 (1947); *Sipes* v. *McGhee*, 316 Mich. 614 (1947); *Malicke* v. *Milan*, 320 Mich. 65 (1948).

Racially restrictive convenants did not have to appear in every deed in an area in order to produce a segregated neighborhood. It was enough if it was contained in sufficient deeds to indicate a general plan for excluding Blacks from the area. See *Schulte* v. *Starks*, *supra*, 238 Mich. at 106:

> "That a portion of the conveyances do not contain the restrictions will not defeat the same. Although some of the

> lots may have written restrictions imposed upon them and others not, if the general plan has been maintained from its inception, if it has been understood, accepted, relied on, and acted upon by all in interest, it is binding and enforceable on all *inter se*. It goes with the land, and is equally binding on all pruchasers with notice."

The callousness of the judicial approach at the time is exhibited by the court's comments in *Schulte* v. *Starks*, *supra*, 238 Mich. at 105:

> "The fact that defendants are colored persons is established by their own admissions while on the witness stand and by the finding to that effect by the trial judge who saw them in court. The record does disclose, however, that Mrs. Starks is quite light colored, and she testified that many, many times she has been taken for a white woman."

The adjudication process was a simple one. No grave constitutional issues here, no questions of human rights. The only issue was a simple factual one: Are the prospective occupants of the realty black? If they are, the matter is ended. The covenant is enforceable. The mere fact that the Starks were Black triggered a discriminatory practice, upheld and enforced by the state.

Racially restrictive covenants had effects beyond the creation of segregated neighborhoods. When coupled with policies aimed at creating and maintaining harmonious neighborhoods, they inevitably gave rise to the general idea that one could buy a right to a parochial school system carved out of a public system of compulsory ". . . free public elementary and secondary schools as defined by law." [121] Such a notion is an invidious discriminatory result fostered by "State action under color of law."

Racially restrictive covenants have not been the only discriminatory device which grew up after the Civil War. Mere blackness has historically triggered racial discrimination in education, housing, employment, lending institutions, "separate but (supposedly) equal" accommodations, political, social, economic relations,

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[121] See Mich. Const. of 1963, Art. VIII, Sec. 2.

public and private, much of which is "under color of law." To the country's detriment, discrimination became habitual in the North as well as in the South. See *Strauder, supra.*

In a landmark case in 1948, the Supreme Court of the United States held that enforcement by state courts of racially restrictive covenants was itself state action which violated the Equal Protection Clause of the Fourteenth Amendment. *Shelley* v. *Kraemer,* 334 U.S. 1, 92 L.Ed. 1161 (1948). Judicial enforcement of racially restrictive covenants was but another example of the fallacy of "official state" action rationalized to avoid the clear constitutional obligation "to secure equal protection of law" to all citizens. It turns into another vestige of slavery.

However, nationally, the invidious effects of such covenants have persisted into the present to foster and maintain the customary pattern of segerated housing.

There is substantial evidence in the record of the extensive historical use of racially restrictive covenants in Kalamazoo prohibiting sale to and use of property by Blacks. This is particularly true in plats around the perimeter of the city. [122] Significantly, the attendance zones for the Black elementary schools do not contain such covenants with the exception of one in the Woodward area. Many of the covenants appear in deeds in Kalamazoo dated long after the Shelley decision. [123] Covenants continue to appear in abstracts of title and appeared in title insurance policies until 1969 when some Michigan title insurance companies agreed to discontinue their inclusion after requested to do so by the Department of Justice. [124]

The chilling effect of such covenants was furthered by the United States Government through its Federal Housing Administration policies, which fostered segregation. A glaring example is found in explicit provisions of FHA manuals, revised through 1938 and still utilized in the 1950's, which discouraged financing

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[122] Pl. Ex. 1863, Overlay maps, Plats Having Recorded Racial Restrictions, Stipulation of Undisputed Fact #6.

[123] Stip. #6, pp. 8-16, Sec. X, nos. 1-88.

[124] Pl. Ex. 1713.

a real estate transactions that introduced "inharmonious racial groups" into a community. FHA fostered school segregation by advising in an underwriting manual that a neighborhood "under consideration will prove far less stable and desirable . . . *if the children of people living in such an area are compelled to attend a school where the majority or a goodly number of pupils represent a far lower level of society, or an incompatible racial element.* . . ."[125] (Emphasis supplied.)

Furthermore, at least through 1948, the Department of Real Estate of the Michigan Corporation and Securities Commission, which was responsible for the licensing and regulation of real estate brokers, published with actual approval the Code of Ethics of the National Association of Real Estate Boards. Article XXXIV of the Code is a specific and unequivocal ethical prohibition against the introduction into a neighborhood of "members of any race or nationality whose presence will clearly be detrimental to property values in that neighborhood." The national code, including Article XXXIV, was included in the by-laws of the Kalamazoo Board of Realtors in 1945 and in 1950.

As late as 1963, the Michigan Supreme Court restrained the enforcement of a rule of the Michigan Corporation and Securities Commission which permitted the revocation of the license of a real estate salesman who practiced discrimination as to prospective purchasers in real estate transactions on the basis of race, color, religion, national origin, or ancestry. *McKibbin* v. *Corp. & Sec. Comm'n.*, 369 Mich. 69. It is worth noting that *Shelley, supra*, decided that "judicial acts of the highest court of the State in authoritatively construing and enforcing its laws is the act of the State." 334 U.S. at 15.

The record clearly establishes that "state action" contributed to the creation and perpetuation of neighborhood segregation in Kalamazoo. The school board should not be heard to plead that its neighborhood school policy was racially neutral when in fact "state action under the color of law" produced or helped to produce the segregated neighborhoods in the first place. The Michigan

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[125] Stip. #6, pp. 5-6, Sec. V, nos. 1-7.

courts' decisions in the area of racially restrictive covenants were acts of discrimination which contributed to the segregation of school children in the Kalamazoo system. *Shelley*, *supra*. In this respect, the comments of the court in *Bradley*, *supra*, 338 F. Supp. at 587, aff'd. on issue of segregation, *supra*, No. 72-1809-1814, are particularly appropriate. The State of Michigan should not be allowed to escape constitutional responsibilities by fractionalizing its jurisdiction through many agencies.

Governmental actions and inactions at all levels, federal, state and local, have combined, with those private organizations, such as loaning institutions and real estate associations and brokerage firms, to establish and to maintain the pattern of residential segregation throughout the Detroit metropolitan area. It is no answer to say that restricted practices grew gradually (as the black population in the area increased between 1920 and 1970), or that since 1948 racial restrictions on the ownership of real property have been removed. The policies pursued by both government and private persons and agencies have a continuing and present effect upon the complexion of the community—as we know, the choice of a residence is a relatively infrequent affair. For many years FHA and VA openly advised and advocated the maintenance of "harmonious" neighborhoods, *i. e.*, racially and economically harmonious. The conditions created continue. While it would be unfair to charge the present defendants with what other governmental officers or agencies have done, it can be said that the actions or the failure to act by the responsible school authorities, both city and state, were linked to that of these other governmental units. When we speak of governmental action we should not view the different agencies as a collection of unrelated units. Perhaps the most that can be said is that all of them, including the school authorities, are, in part, responsible for the segregated condition which exists. And we note that just as there is an interaction between residential patterns and the racial composition of the schools, so there is a corresponding effect on the residential pattern by the racial composition of the schools. 338 F. Supp. at 587.

This court, like the Fifth Circuit Court of Appeals, ". . . has carefully considered the Board's claim that its neighborhood

school plan was established on a racially neutral criteria and impartially administered, and is therefore, beyond the pale. This contention, that treatment of blacks the same as whites lends a patina of non-segregated responsibility to the system is, when analyzed, not as pristine, as it appears. The Supreme Court made it plain in Swann that:

> "An assignment plan is not acceptable simply because it appears to be neutral; such a plan may fail to counteract the continuing effects of past school segregation resulting from discriminatory llcation of school sites or distortion of school size in order to achieve and maintain an artificial racial separation. When school authorities present a district court with a 'loaded game board,' affirmative action in the form of remedial altering of attendance zones is proper to achieve truly nondiscriminatory assignments. 402 U.S. at 28." Cisneros, supra, 467 F.2d at 149.

The May 7 board remedially altered attendance zones and this court simply affirmed its constitutionally sanctioned action.

The fact is that many state, federal and private organizations have made substantial contributions to residential segregation. The Report of the Senate Select Committee on Equal Educational Opportunity summarizes:

> "B. The Causes of Residential Segregation.
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> As in the case of school segregation, housing segregation is seldom a matter of individual choice. It is clear that Federal, State and local governmental practices, at every level, have contributed to the housing segregation which exists today. These actions combine with those of private organizations such as lending institutions, real estate brokerage firms, land developers and others to establish and maintain residential segregation." [127]

In his testimony before the Select Committee, George Romney, then Secretary of the Department of Housing and Urban Development, placed these matters in historical perspective. The

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[127] S. Rep. No. 92-000, 92D Cong. 2d Sess. 121-122 (1970).

answer, he said, lies in

> "our country's tormented history of race relations. . . . Throughout most of that history, *the dominant majority supported or condoned social and institutional separation of the races. This attitude became fixed in public law and public policy at every level of government and every branch of government,* and thus it was adopted as a matter of course by the Federal Government when it entered the housing field in the 1930's. It continued after World War II." [128] (Emphasis supplied.)

Secretary Romney described the dynamic forces which exist in metropolitan cities, the state and the nation. These forces conjoin, comingle, interreact and substantially cause and contribute to discriminatory segregation of housing and schools. The Kalamazoo School board and the State Board of Education in Kalamazoo functioned within the framework of residential segregation, and interreacted twith these dynamic community forces. The record shows that the Kalamazoo board and its agents at all times had intimate knowledge of the location, size and evolving character of each residential area in Kalamazoo.

The record further shows that the Board maintained constant formal contact with the community at large through various citizens groups and with important private interest groups such as the Board of Realtors. The school board members themselves were community leaders, lawyers, bankers, academicians, industrialists, and the like, who were active in civil affairs and who had extensive personal knowledge of Kalamazoo and the way that public agencies and private groups functioned in the city.

There are often multiple causes of a situation which deprives Black children of equal opportunities, and each cause, if it has a significant impact, will be in fact and law a contributing cause. When the action of many state agencies other than school authorities contributes to the creation and maintenance of segregated housing, and when the school authorities deliberately set attendance zones along "neighborhood" lines, then, as the Fifth Circuit

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[128] Id. at 2775.

has observed, "we are faced with *double* discrimination." Texas Education Agency, supra, 467 F.2d at 863, n. 22.

In this case, the actions of multiple state governmental bodies, many of them apparently in violation of the Constitution, joined with actions of a similar character by federal agencies and with the actions of private institutions to produce segregated conditions in Kalamazoo.

The fact that many public and private institutions made deliberate and substantial contributions to neighborhood and school segregation in Kalamazoo does not excuse the State Board of Education, the Superintendent of Public Instruction, and the Kalamazoo Board of Education from liability for their violation of the Constitution of the United States and the Constitution of the State of Michigan. The State of Michigan cannot parcel out its jurisdiction and deliberately achieve by bits and pieces what it could not do directly by statute. When such a situation is alleged to exist, the court must look closely at the actions of each agency to determine whether it has met its constitutional responsibilities. To allow each agency to plead constitutional violations of other agencies in exculpation of its own, would be to mock the Constitution of the United States and the Constitution of the State of Michigan.

Judge Edwards in the Nashville Board of Education case stated:

> "The Constitution of the United States was written for one nation, 'indivisible.' As it speaks to men's consciences, the Constitution argues against division and apartheid.
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> "In the public domain, however, the Constitution commands. Here the constitutional command is One America." *Kelley* v. *Metropolitan Cty. Bd. of Ed. of Nashville, Tenn.*, 463 F.2d 732, 746 (6th Cir. 1972).

IV.

Notwithstanding all of the deliberate overtactions and damaging consequential omissions on the part of the state and local defendants before 1971, the direct consequences of both the July

6, 1971 local board resolution and the occurrences which specifically preceded it lay the most concrete uncontroverable predicate for the grant of equitable relief which plaintiffs seek. In order to appreciate the significance of the state activities in the field of student racial dispersion and to understand the full meaning of the July 6 action, it is necessary to trace the accelerating progression of events in the State of Michigan which culminated in the May 7, 1971 fruition of the Kalamazoo desegregation commitment.

The response of the State authorities to segregation in Michigan Public schools has been spotty and generally ineffective. The Michigan Constitution of 1908 gave the Superintendent of Public Instruction "general supervision of public instruction in the state." Art. XI, Sec. 2. Following the decision of the Supreme Court in Brown I, supra, the Superintendent of Public Instruction reviewed various complaints requesting his assistance in preventing the establishment of racially identifiable schools. These complaints emanated from local branches of the NAACP, on behalf of Black children and their parents, in the cities of Grand Rapids, Pontiac and Benton Harbor. The Superintendent refused to act on these complaints on the ground that he had been advised by the Attorney General that he had no authority to act.

This refusal was effective notice to the local school districts throughout Michigan, including Kalamazoo, that even though any actions taken by them intentionally created or perpetuated identifiably Black schools, they need not be concerned with the Superintendent of Public Instruction even though his office was charged with supervision and leadership of public education in Michigan.

In Kalamazoo, and elsewhere, the period between the decision in Brown and the adoption of the new state constitution in 1963 was an extremely active period in terms of school construction, annexation, and boundary change. The response of the Superintendent to the segregated school problem during this period was for all practical purposes to turn a deaf ear. Had he, following the decision in Brown, required that no action be taken which created or perpetuated segregated schools, much of the segregation in schools in Michigan which the Federal courts have been called upon to remedy in recent years could have been avoided.

In 1963, the people of Michigan adopted a revised Constitution which included a number of provisions guaranteeing civil rights and prohibiting discrimination on the basis of race. These provisions were included partially in response to the civil rights movement which reached its height in the early 1960's, and were clearly intended to be both an implementation of the Fourteenth Amendment, as interpreted by the United States Supreme Court in Brown I, supra, and other decisions, and an independent guarantee of the civil rights of Michigan citizens.

The elected delegates to the Constitutional Convention of Michigan in 1961 and 1962 prepared a report to the people of Michigan in accordance with the requirements of Act No. 8 of the Public Acts of 1961, section 168.181 of the Compiled Laws of 1948, which reads in part as follows: "The convention shall, before its adjournment, prepare and adopt an address to the people of the state, explaining the proposed changes in the present constitution, and the reason for such changes, and such other matters as to the convention shall seem advisable. Not less than 25,000 copies of this address, in pamphlet form, containing the full text of the revised constitution shall be printed and distributed as the convention shall direct." The document was entitled "What the Proposed New State Constitution Means To You."

Under each section of the proposed Constitution is an explanatory statement of that section. "Article VIII, Education, Sec. 2," and its explanatory note are as follows:

> "Sec. 2. The legislature shall maintain and support a system of free public elementary and secondary schools as defined by law. Every school district * * * shall provide for the education of its pupils without discrimination as to religion, creed, race, color or national origin. * * *
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> * * *
>
> The anti-discrimination clause is placed in this section as a declaration *which leaves no doubt as to where Michigan stands on this question.*" [129] (Emphasis supplied.)

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[129] Michigan Constitutional Convention of 1961-62, "What the Proposed New State Constitution Means To You," 77 (1962).

This report was widely circulated. It was made available to all governmental agencies, the State Bar, and the general public. It received considerable mass media coverage, of which this court takes judicial notice.

These sections were written with several things in mind: the history of slavery, slave trade, race relations, civil rights, the Brown decision, and the then immediate dilemma in desegregation of sothern schools. The delegates wanted to make it crystal clear what the people of Michigan were voting for when they adopted the Constitution.

The education provision was a specific application of the more general equal protection clause included in Article I, Sec. 2. The delegates noted that the "principal, but not exclusive, areas of concern are equal opportunities in employment, education, housing and public accomodations." [130] Finally, the State's commitment to equal opportunity was given further substance by the creation, by Article V, Sec. 29, of a new Civil Rights Commission with a duty to investigage alleged discrimination and to secure the equal protection of civil rights without such disrimination.

The civil rights sections of the new Constitution were Michigan's implementation of the Fourteenth Amendment of the United States Constitution. These provisions of the state Constitution should be interpreted in accordance with the language of *Strauder* v. *West Virginia*, *supra*, when that Court spoke to the interpretation of the Fourteenth Amendment:

> "If this is the spirit and meaning of the Amendment, whether it means more or not, *it is to be construed liberally*, to carry out the purposes of its framers. * * * *The words of the* amendment, it is ture, are prohibitory, *but they contain a necessary implication of positive immunity, or right, most valuable to the colored race*, – the right to exemption from unfriendly legislation against them distincly as colored, – exemption for legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which ohters enjoy, and discriminations which are steps towards reducing them to the condition of a subject

[130] Id. at 12.

race." 100 U.S. at 307, citied in *Brown I, supra*, 347 U.S. at 490, no. 5. (Emphasis supplied.)

Justice Brewer asserted that the Declaration "is the thought and the spirit, and it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence." *Gulf, Colorado & Sante Fe Ry.* v. *Ellis*, 165 U.S. 150, 160 (1897).

In addition, the State Board of Education and the State Superintendent of Public Instruction have under past and present statutes, the authority to compel boards of education and local school board officers to comply with the laws relating to schools and to secure observance of these laws through due process of law instituted in the courts under the direction of the Attorney General.[131]

The statutes of Michigan obligated the Superintendent of Public Instruction to do all things necessary in order to promote the welfare of public schools and public educational institutions.[132]

The relevant statutes provide that no separate school or department shall be kept for any person or persons on account of race or color and ultimately the Superintendent of Public Instruction has the power under MSA 15.3253 to remove from office upon proper notice and proof any member of a school board who persistently and without sufficient cause refuses and neglects to discharge any of the duties of this office.[133]

The State Board of Education and the Superintendent of Public Instruction have ample administrative and judicial process to compel compliance with the mandates of the Fourteenth Amendment and the Constitution of the State of Michigan to secure equal protection of law and equal educational opportunity for Black children, or for any children, who may be denied such educational opportunities by reason of their religion, race, creed, color or national origin.

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[131] MSA Sec. 15.3252.

[132] MSA Sec. 15.3355.

[133] MSA Sec. 15.3355; *Johnson* v. *Gibson*, 240 Mich. 515 (1927), Pl. Ex. 869.

In 1964, the Superintendent of Public Instruction published "Suggested Guidelines for Providing for the Maximal Education of Children of All Races and Creeds in the Schools of Michigan." [134] These guidelines, prepared under the auspices of a Special State Committee on Equal Educational Opportunity, were specifically designed for use by local school boards in Michigan. The Preamble declared:

> "Educators, citizens, and courts assert that prevention of personal associations through segregation – whether *'de jure'* or *'de facto'* – seriously affects the quality of education. Segregation, particularly involuntary segregation, whether it is social, ethnic, economic, or racial, diminishes equality of educational opportunity for all children." [135]

Local school authorities were informed that:

> "They should initiate reports and/or studies which clearly delineate the presence or absence of circumstances within a community that contribute to the development and/or maintenance of racially segregated schools and/or discriminatory practices." [136]
>
> * * *
>
> "The need for relief from overcrowded conditions in a school provides an opportunity for integration. Measures taken should be carried out in a manner that promotes integration in the receiving school." [137]
>
> * * *
>
> "When redistricting or relocation of schools is necessary and when new shcool sites are being selected, these efforts should be guided by principles which promote integration." [138]

These guidelines also included a description of one proposed technique for regrouping students:

[134] Pl. Ex. 1222.

[135] Id. at 1.

[136] Id. at 4.

[137] Id. at 6.

[138] Id. at 7.

> "Two or more adjacent schools are combined in a single attendance area. Rather than have all grades in each school the first three grades for a larger area may be assigned to a building and the next three grades for the larger area assigned to another building."[139]

Seven years later, the Kalamazoo Board of Education adopted this technique to achieve integration in its schools.

Following the circulation of the Superintendent's guidelines, the State Board of Education and the Michigan Civil Rights Commission issued a widely publicized Joint Policy Statement on Equality of Educational Opportunity on April 23, 1966. [140] That statement has been reproduced in its entirety in this court's previous opinion, and therefore need not be repeated here. [141] This document was exceedingly significant, however, for, referring to *Brown I* and to the public policy of the State, it contained the express recognition (1) that racially separate educational facilities are inherently unequal, and (2) that affirmative steps should be taken by local school officials to minimize racial isolation as much as possible. With respect to the latter proposition, the Joint Statement specifically provided:

> "While recognizing that racial imbalance in Michigan schools is closely related to residential segregation patterns, the Board of Education and Civil Rights Commission propose that creative effots by individual school districts are essential and can do much to reduce or eliminate segregation. Local school boards must consider the factor of racial balance along with other educational considerations in making decisions about selection of new school sites, expansion of present facilities, reorganization of school attendance districts, and the transfer of pupils from overcrowded facilities. Each of these situations presents an opportunity for integration."

In order to facilitate the implementation of these directives, the statement concluded by calling for the collection of racial census

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[139] Id. at 6.

[140] Pl. Ex. 17.

[141] 346 F. Supp. at 776-777.

data in the schools in order to chart "a base line against which future progress can be measured."

The court finds that the Joint Policy Statement of 1966 was a step by the State Board of Education and the Civil Rights Commission towards the full implementation of the Fourteenth Amendment in Michigan public schools. This is obvious not only from the letter and spirit of the Statement, but also from the express references to *Brown I* and to the Michigan Constitution, which itself was an implementation of the Fourteenth Amendment.

The State Board of Education made other gneral statements and recommendations concerning the desirability of integrating the public schools of Michigan. On September 13, 1967, the Board approved five recommendations to be proposed to the local school boards to encourage them to act to achieve educational opportunity. Among other things, the schools were encouraged to "integrate staff at all levels" and to "redraw school district boundaries to effectuate a greater degree of integration."[142] On the death of Martin Luther King in 1968, the State Board affirmed its "strong intention to press on every front within its jurisdiction the cause for which Martin Luther King lived and died," "eradicating the ugly stain of prejudice which has marked our land and the problems that prejudice creates. . . ."[143]

For a time after the adoption of the Joint Policy Statement of 1966, the State Board of Education began to lay the foundation for strong affirmative action to eliminate segregated schools in Michigan. The Michigan Department of Education began to collect and to publish annually school racial-ethnic census data.[144] In March 1967, an Office of Equal Educational Opportunity was established within the office of the State Superintendent of Public Instruction. This office was given responsibility for conducting and supervising departmental efforts to achieve equality of educational opportunity. During 1968-1969, the OEEO embarked on a program designed to assist Michigan school districts to desegregate their schools. Among other things,

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[142] Pl. Ex. 790.

[143] Pl. Ex. 776.

[144] See, e.g., Pl. Ex. 129, 149, 148.

the OEEO identified target school districts which maintained segregated schools, and assisted local district officials, including those in Kalamazoo, in drawing up desegregation plans.[145]

The court observes that Marvin Tableman, who headed the Office of Equal Educational Opportunity, worked affirmatively to carry out the mandates of the Fourteenth Amendment and the Constitution of the State of Michigan, which were integration for equal educational opportunities. His activities in assisting the Kalamazoo School Board were substantial and effective.

Aside from grand pronouncements, the collection of data, payment for IIT computer runs, and provision of technical assistance to a few districts, the State Board of Education, even though apparently given extensive constitutional power to supervise and lead public education, has done virtually nothing to bring about a desegregation of public schools in Kalamazoo or elsewhere. The record includes many references to occasions on which the staff of the Michigan OEEO formally explained the critical need for specific criteria against which to assess the performance of local school districts in addressing school segregation.

Specific recommendations were repeatedly tendered to the State Superintendent of Public Instruction and the State Board on ways to effectively implement the 1966 Joint Policy Statement and to secure meaningful compliance with the desegregation policy.[146] The Board ignored OEEO's concrete proposals for an equal opportunity audit of local school board policies, for a specific scheduling of state-wide desegregtion and even for in-depth official discussions of the segregation problem in Michigan. Instead, the Board applied its supervisory authority and initiative toward directing local districts to adopt codes of conduct regarding student discipline.[147]

It is thus not surprising that the OEEO reported to the federal government in 1971 that there has been "only slight

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[145] Testimony of Mr. Marvin Tableman, former Director of OEEO, Tr. V, VI-1, VI-2, passim; Pl. Ex. 51, at 3-4.

[146] Testimony of Mr. Tableman, Tr., V, VI-1, VI-2, passim; Pl. Ex. 53, at 18; 97, 1589.

[147] Pl. Ex. 192.

progress in achieving the objectives set forth in the 1966 policy statement."[148]

Recently, under the white heat of election returns, the State Board has abandoned its policy of studied inaction for a positive retreat from constitutional principles. When frustrations compelled Mr. Tableman to resign his position at OEEO, the seeds of retrogression had been effectively sown. The OEEO has been allowed to decline. The Joint Policy Statement appears to have been abandoned.

Although the Superintendent has continued to make statements indicative of support for school desegregation, the court has perceived no truly effective action to end segregation by the Department of Education.

In sum, the Superintendent had general supervisory authority over public education in Michigan between 1954, the date of the Brown decision, and the adoption of the new Constitution. The State Board of Education and the Superintendent as its chief executive officer have shared this constitutional power between 1963 and the present. During this entire period, the Superintendent and the Board were aware of racial segregation in Michigan public schools through complaints to this effect and then through their own statistical data. Still, the Superintendent and the State Board have persistently failed to act in a meaningfuly way to ameliorate the situation.

These facts compel the conclusion that the State of Michigan, through the State defendants in this case, has intentionally sanctioned the segregation of schools by local boards, and has made a substantial contribution to the creation and maintenance of segregated public schools in Kalamazoo and elsewhere. While the court notes that the Michigan Attorney General issued an opinion in 1970 that the State Board did not have the jurisdiction to hear appeals and review decisions of boards of education on attendance zones, the court finds that too many genuine opportunities for action have existed since Brown in 1954 for the segregation evidenced by the census statistics to be fully excused by pleas of

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[148] Pl. Ex. 55, at 3.

racial neutrality and merely adventitious segregation.

The State Board's persistent failure to implement the Joint Policy Statement of 1966 has been effective notice to local school districts throughout Michigan of a policy of non-supervision in the area of desegregation. These school boards were able to conclude that they could take actions for perpetuating Black schools without the interposition of the State Board and the State Superintendent. This non-action exacerbated the segregated conditions in many school systems in the State of Michigan, diminished the likelihood of voluntary desegregation, and permitted or perhaps encouraged the kind of counterproductive action exhibited in Kalamazoo on July 6, 1971.

Activity at the local level was first sparked, according to the testimony of Edward P. Thompson, former President of the Kalamazoo Board of Education, by high school racial disturbances in the fall of 1967. Demands for revised curricula, Black studies and more open cheerleader selection alerted board members to deeper problems of hopelessness, fears and injustice inflicted on minorities by segregated conditions.[149]

On May 20, 1968, the Kalamazoo Board appointed the Administration Integration Committee and charged it to "develop a master plan" for the integration of all levels of education. Following extensive study, research and deliberation, this committee filed its report, entitled "School Integration" on November 8, 1968.[150] That report commenced with a citation of the following "basic assumption:"

> "Since the Kalamazoo Board of Education has firmly committed itself to the integration of the Kalamazoo Public Schools, it is the function of this committee to supply Board members with informtion that will assist them in making decisions regarding procedures for integrating all schools."[151]

The report thereupon set forth an extensive discussion, revealing

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[149] Deposition of Edward P. Thompson, at 9-13.

[150] Pl. Ex. 37.

[151] Id. at 2.

the depth of the committee's study, of the various sociological, psychological, educational and legal reasons which formed the "rationale for integration."[152] Included with the legal reasons were references to the Michigan Constitution and the 1966 Joint Policy Statement of the State Board of Education and the Civil Rights Commission.

The Administration Committee report summarized the statistical and other factual data revealing the complexion of the segregation problem in Kalamazoo and then proceeded to review the basic conceptual elements of each of nine possible solutions. Described for the board and public were the following desegregation alternatives: open enrollment, pairing, central schools (sometimes called "grade centers"), school closing, magnet schools and supplementary centers, education complexes, metropolitan school districts, pupil exchanges and an education park. No single such plan was specifically recommended.

Unfortunately, the Administration Committee's report was seriously misleading in at least one significant respect. The report defined "de facto" and "de jure" segregation as follows:

> "1. *De Facto Segregation* – is not instituted nor perpetuated by legal means, but exists as a matter of fact *whether with or without the wish of anyone concerned.*
>
> "2. *De Jure Segregation* – is segregation which is achieved by legislative means. It is now illegal."[153] (Emphasis supplied.)

In legal terms, these definitions are clearly erroneous. "De jure" segregation is not confined to legislatively imposed segregation, but occurs when any state agency, including a local school board, intentionally segregates Black children. The clear implication of the report is that the Kalamazoo board could not possibly be guilty of de jure segregation, since the term applied only to legislatures. This is simply incorrect.

In one of the first cases in which the Supreme Court interpreted the Fourteenth Amendment, it clearly said that the

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[152] Id. at 3-8.

[153] Id. at 2.

Amendment applies to *all* officers of the State:

> "We have said the prohibitions of the Fourteenth Amendment are addressed to the States. * * * They have reference to actions of the political body denominated a State, by whatever instruments or in whatever modes that action may be taken. A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning. Then the State has clothed one of its agents with power to annul or to evade it." Ex parte Virginia, supra, 100 U.S. at 346-347.

The definition of "de facto" segregation in the Kalamazoo Administration Committee's report presents similar difficulties. Since under the *Swann, supra,* and *Keyes, supra,* theory, the question of *intention* is the essence of the difference between de facto and de jure segregation in law, it is simply not true that de facto segregation is segregation which "exists as a matter of fact whether with or without the wish of anyone concerned." On the contrary, segregation which exists by the wish and act of the local school board is without a doubt *de jure,* not de facto, segregation.

To the extent that the Kalamazoo administration, school board, and public relied upon these definitions in analyzing the problem of segregated schools in the district, they made a very serious error. And this court has concluded on the basis of a full review of the evidence, Kalamazoo's public schools were segregated on a *de jure* basis.

On November 6, 1968, the President of the Kalamazoo Board of Education appointed a Citizens' Committee on Integra-

tion to recommend, among other things, general guidelines for the achievement of socio-economic and racial integration throughout the Kalamazoo public schools. The report was submitted on August 18, 1969. [154]

The major thrust of the report was a detailed proposal for change. Explicitly structured recommendations were presented rather than mere analytical descriptions. The report also stressed the legal and moral obligations and the social and educational reasons to integrate the public schools of Kalamazoo as soon as possible. [155]

Although the Citizens Committee independently investigated several alternative desegregation schemes, including open enrollment, grade centers, educational service centers and an Evanston-style unitary facility, it endorsed the pairing concept mentioned in the 1964 State Superintendent's Guidelines. The concept involved basic retention of geographically contiguous "neighborhood" attendance zones. The zones would be enlarged and stretched so as to bridge inner city minority students with suburban White students. Such a plan seemed most conducive to circumstances in Kalamazoo, since the district is relatively compact. Schools within these enlarged districts would, under this plan, service three rather than six elementary grades, with kindergarten children attending all schools.

The Committee urged that before full implementation of this integration plan, scheduled for September 1971, a comprehensive program of minority staff recruitment, in-service staff training, curricula revision, and community communications be undertaken for two years. This program, dubbed "Phase One" and "Phase Two," was in fact adopted by the board on September 15, 1969, and later effectuated. With respect to proposed "Phase Three," actual desegregation, the board authorized a more detailed feasibility study to be made by the administration during the school year of 1969-1970. At this time the board was aware of the availability of computer assistance at the Illinois Institute of Technology which could facilitate the generation of these necessary details.

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[154] Pl. Ex. 38.

[155] Id. at 4-5. See Appendix B.

While the Citizens' Committee was doing its study on integration, the Michigan Civil Rights Commission focused additional state governmental attention on the racial characteristics of Kalamazoo public schools. In April 1969, the Commission held hearings and in October of the same year it issued its report and recommendations regarding the "Status of Race Relations in the City of Kalamazoo." [156] This report also emphasized statistical information showing the disproportionate concentration of the races in the schools and the resultant educational deprivation. Its number one recommendation to the school board was to *"Agree quickly on a plan for desegregation of all schools and immediately carry it out."* [157] (Emphasis supplied.)

Meanwhile, in response to the local board's request for specifics, the Kalamazoo school administration initiated contacts with the Illinois Institute of Technology (IIT) computer service suggested by the Citizens Committee. On December 19, 1969, IIT made a specific contract proposal to Kalamazoo officials. The financial demands of the proposal forced these local officials to investigate possible sources of necessary funding. The State Department of Education was contacted and, following substantial communication, agreed to underwrite the project. On April 10, 1970, the contract with IIT was executed.

The Kalamazoo administration, particularly the Department of Child Accounting and its Director, Mr. Maynard Morgan, immediately began the major task of gathering and organizing data concerning pupil identity, race, location and grade for the entire Kalamazoo school district. This data was then submitted to IIT along with maps and statistical guidelines in August 1970. The guidelines included a request for a feasible plan for implementing the basic pairing concept recommended by the Citizens Committee, with student populations fixed roughly between 10% and 25% Black. [158] In the fall of 1970, according to the testimony of Mr. Morgan, a few administrative "bugs" were ironed out of the data and computer programming task was completed.

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[156] Pl. Ex. 1.

[157] Id. at 13.

[158] In 1969, 17.6% of the students in Kalamazoo public schools were Black.

On January 4, 1971, the Kalamazoo Board of Education further addressed planning the integration of its schools. Following public discussion, the board voted to adjust the boundaries of its two high schools, Central and Loy Norrix, so as to accomplish their desegregation in the coming school year, to begin in September 1971. [159] The board further resolved to desegregate the five junior high schools by September of 1972. [160] Plans and maps for each of these proposals were reviewed and adopted.

In March 1971, school administrators met with IIT officials to discuss the status of the computer system. It was revealed at this time that IIT was finished with all necessary preparations and that the computer was available on very short notice to generate the concrete results desired by the board.

After briefly checking with Kalamazoo Superintendent John Cochran as to the possibility of obtaining a prompt administrative response, the Board of Education resolved on April 5, 1971, on the motion of Edward Thompson:

> "That all schools in the Kalamazoo system be desegregated promptly, that the school administration present to the board at its May 3 meeting a plan for desegregating all the schools, and that it then advise the board of the earliest date for accomplishing the same." [161]

Four members of the board supported this resolution, while the remaining three, although present, abstained. Although defendants have insisted that this resolution was a bolt out of the blue, careful reflection upon the steady chronology of events, as set forth above, reveals beyond reasonable question that it was neither precipitate nor surprising.

Far from demanding from the administration in one month plans which should have received greater consideration, the April 5 resolution merely sought the final report of specifics which had been the object of over eighteen months' combined effort of the

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[159] Stip. #5, p. 10, nos. 26, 27; Pl. Ex. 1139.

[160] Stip. #5, pp. 10-11, no. 28; Pl. Ex. 1130.

[161] Pl. Ex. 7 at 404.

Kalamazoo administration, the Michigan Department of Education and the IIT computer technicians. These specifics, in turn, had only been sought after fifteen months of investigation, research and study spearheaded by two specially appointed, independent committees. Board members Thompson, Luff, Schmae and Thomas, who supported the April 5 and May 7 resolutions, were advised of and involved in this long chain of events. Their confidence that an appropriate response could be forthcoming from the administration within the time allotted was rewarded by the actual subsequent sequence of events.

Two days after the board's April 5 action, the school administration received from IIT a full print-out of possible boundary adjustments and pupil assignments conforming to earlier requests. Again under the principal direction of Child Account Officer Maynard Morgan, the administration reduced the assembled data to map form to facilitate explanation and understanding. During this process, the data was also scrutinized for practical irregularities, and modifications and refinements in boundary locations were affected. By the last week in April 1971, administration officials were in a position to publicly present and explain the contemplated elementary school rezoning. The plan was widely publicized in the local news media.

The regularly scheduled May 3, 1971 school board meeting, although specially located in a high school auditorium in anticipation of a large audience, was adjourned shortly after it convened because of extreme overcrowding. Public debate continued, however, both on May 3 and at a public hearing on May 6 in Miller Auditorium on the campus of Western Michigan University, attended by literally thousands of citizens. The formal board meeting originally planned for May 3 was held on May 7 before several hundred people in the auditorium of Kalamazoo Central High School.

At the public hearing of May 6, many speakers expressed their feelings about the plan. The board listened extensively to various viewpoints, although at this state, Edward Thompson later testified:

> "We had had so many hearings on so many different things and heard so many people over so many years that, frankly, I

> wasn't interested in listening to any more hearings on this kind of thing. I felt the kind of input we were getting was repetitive and I was ready to make up my mind."[162]

At the conclusion of this meeting, the Kalamazoo Board of Education decided by a vote of four to three to implement the proposed desegregation plan for the elementary schools in September of 1971 and to advance the junior high plan to this date as well.[163] Despite defendants' repeated assertion that the decision of May 7 was predicated on no more than a month's deliberation, this court, after hearing and reviewing the voluminous testimony, has concluded that this board action on May 7 was carefully conceived and thoughtfully adopted. This conclusion is no less compelling due to the natural fact that much of the mechanical legwork was accomplished by upper echelon members of the full-time administrative staff rather than performed entirely by the members of the school board.

The board members kept themselves advised of developments and provided the basic conceptual guidelines. They also sought and received assurances from their competent and trusted staff that the proposed plan was feasible, that buses could be obtained, facilities prepared, teachers reassigned, and so forth.[164] All of the studies, planning and discussion initiated and supervised by the board preparatory to the May 7 action emphatically confirm the integrity of the Kalamazoo Board of Education's later declaration in "state court" explicitly denying that the "May 7 plan" was unreasonable, arbitrary and capricious.[165]

The entire chain of events detailed above establishes that by the year 1971 government officials with direct responsibility for public education on both the state and local level – including principally, the defendants named herein – had become thoroughly,

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[162] Deposition of Thompson, at 196.

[163] Stip. #5, p. 12, nos. 33-34.

[164] This theme recurs throughout the testimony, but is succinctly expressed by Edward Thompson, Deposition, at 77-78.

[165] Pl. Ex. 1187, at 5. Following the adoption of the desegregation plan, the board was sued in Kalamazoo County Circuit Court by a group of citizens charging that the board action in this respect was arbitrary and capricious and unreasonable. The cited exhibit is the board's Answer filed in that suit. *Conant* v. *Kalamazoo Board of Education*, Civil Action No. 712-246C.

visibly, vocally and inextricably involved in policy-making to eliminate segregated conditions in the Kalamazoo public schools. Policy statements and guidelines were issued, public hearings conducted, racial censuses administered and distributed, promises made. All of these occurrences were intended to and did accomplish an elevation of public consciousness and an uplifting of the expectations of citizens of all races. In the face of such activity, any assertion by defendants that the state action element of plaintiffs' Fourteenth Amendment complaint is not satisfied in this case must be discarded as wholly untenable.

Even beyond the plain fact that defendants directly and exclusively control the student and teacher assignment policies challenged by plaintiffs, the facts summarized above, as elicited at trial, demonstrate beyond contradiction specific state responsibility for the established inequitable consequences clearly and foreseeably flowing from racial segregation in the Kalamazoo public schools.

The May 7 plan of desegregation, thoroughly conceived and conscientiously prepared, was the ultimate manifestation of the conspicuous involvement of state authority in the matter of racial distribution of students. It was this crucial fact of involvement, even more than the actual specific plan adopted on May 7, 1971, from which defendants could not and cannot constitutionally retreat. Especially following these activities of the past decade and a half, defendants cannot simply abdicate all responsibility and disclaim all consequences of student assignment practices which have the clearly foreseeable, and thus, intended effect of segregating the races.

Moreover, because the court has concluded that the Kalamazoo Board of Education intentionally created and maintained segregated schools at least during the period from the early 1950's until the adoption of the May 7 plan, the court finds that the Kalamazoo Board of Education was constitutionally required to adopt the May 7, 1971 plan, or a substantially similar program.

The court further concludes that the adoption of the May 7 plan by the Kalamazoo Board of Education was intended to be and was in fact an implementation of the Fourteenth Amendment of the United States Constitution, the mandatory antidiscrimina-

tion clauses of the Michigan Constitution of 1963, Art. I, Sec. 2, and Art. VIII, Sec. 2, which were themselves implementations of the Fourteenth Amendment, and the 1966 Joint Policy Statement of the Michigan Civil Rights Commission and the State Board of Education. Apart from the question of whether the Kalamazoo board was constitutionally required to adopt the May 7 plan or something substantially the same, the court finds that the board's actions were "proceedings to protect the rights guaranteed to members of all races under the Fourteenth Amendment." Bradley, supra, 433 F.2d at 902. The terms of the public debate, of the Administrative and Citizens' Committees reports, and of the board's deliberations confirm this conclusion.

Insofar as desegregation was constitutionally required, the court finds that the Kalamazoo board was fulfilling its constitutional mandate to act with "all deliberate speed" to put an end to segregated schools in the district when it adopted the May 7, 1971 plan. *Brown* v. *Board of Education*, 349 U.S. 294, 301, 99 L.Ed. 1083, 75 S.Ct. 753 (1955).[166]

Even as it passed the "May 7 plan," the board articulated the policy that this plan would be subject to further administrative modification to minimize inconvenience and simplify administrative problems. In fact, Mr. Maynard Morgan testified that during the course of five public hearings conducted at each of the district's junior high schools following the May 7 action, refinements were suggested and made pursuant to this delegated authority. All modifications were designed to decrease distances between home and school and to maximize the geographic contiguity of the new attendance zones.

The May 7 plan did not survive the extreme reaction of the citizens of Kalamazoo. On July 6, 1971, after the spring elections, the new board adopted a resolution which became known as the July 6th Resolution. [167] The three dissenters to the May 7

[166] "For an American who is devoted to his country and wants to believe in the intelligence and good-will of its citizens it is very painful to contemplate and difficult to understand continued resistance to school desegregation." Julius J. Hoffman, United States District Judge for the Northern District of Illinois, in *United States* v. *School District No. 1*, 301 F. Supp. 201, 205 (N.D. Ill. 1969).

[167] Pl. Ex. 11 at 4-5.

action were joined by the two new members to form a five to two majority in favor of this resolution. Board President Tyler, one of those supporting the resolution, explicitly indicated that he disapproved the language of the resolution calling for further study of alternative desegregation plans, because he was against any such board-instituted plan. [168]

The court finds that although it was phrased as a mere "postponement," the July 6 action was intended to be and did serve as an outright revocation of not only the specific May 7 plan but also the broader underlying policy of school desegregation at the elementary and junior high levels in Kalamazoo. It operated to fully rescind all previous board commitments to integration of public education and to freshly, sweepingly and expressly relegate students to circumstances of racial isolation which denied equal educational opportunity and, consequently, denied these students the equal protection of state law.

That the July 6 resolution was, in fact, a firm nullification and not merely a postponement of board activity in this area is conclusively established by the subsequent course of events as well as by the statements of board members themselves. Although the board did, in early 1972, appoint a committee known as the "Gardner Committee" to study the grade center concept as a possible alternative desegregation plan,[169] the plain fact is that during the two years which have elapsed since July 6, 1971, the board has never adopted or responded favorably in any way to any alternative to the May 7 plan.[170] Pursuant to the authority conferred explicitly by the Sixth Circuit Court of Appeals, 448 F.2d 635, this court has repeatedly urged the parties to come forward immediately with any proposals for change or modification in the school attendance plan implemented on May 7 and subsequently ordered by this court. Notwithstanding such encouragement, the court has never been approached in this regard.

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[168] Id. at 5-6.

[169] The "Gardner Committee" had two successive official names, and submitted two reports. Committee to Propose Alternative School Attendance Patterns, "Preliminary Report" (Jan. 6, 1972), Pl. Ex. 1951. 1972 Schools Improvement Committee, "Final Report" (May 26, 1972), Pl. Ex. 1954. See Stip. #17.

[170] Stip. #17.

The testimony and other statements of members of the Kalamazoo board further indicate the hostility of the board to desegregation in any form. While everyone who testified conceded that effective desegregation in Kalamazoo would require boundary adjustments and some publicly sponsored transportation, several board members clearly stated that they opposed any school attendance plan which involved such transportation. Mr. Norman H. Bruex, a board member in July of 1971, but no longer with the board, testified that he has consistently felt opposed to "forced busing" in any form and that he never would have supported abandonment of the "neighborhood school" policy. He testified that he never intended to vote for *any* plan which inlcuded busing of children, and that he did not intend his vote for the July 6 resolution to be such a vote. He interprets busing to achieve integration as being "forced busing," but busing children for other purposes to be "necessary busing."[171]

Likewise Mr. Jack H. Hoekstra, the author of the July 6 resolution and a member of the board since July 1, 1971, testified that he has never placed any importance on racial mixture of students, that he was and is categorically opposed to busing students for desegregation purposes and that he recognizes no deprivation of equal opportunity as a result of racial segregation. Mr. Hoekstra's testimony as to his interpretation of the July 6 plan follows:

> "Q. So postponement, in terms of your offering it [the July 6 resolution], did not mean any possibility of returning to May 7th, isn't that so?
>
> "A. That is true."[172]

He said the word "postponement" appearing in the July 6 resolution meant that no plan for the busing of a child from his neighborhood would ever be adopted.

Robert W. Keller, a current board member elected in June of 1972, also testified to an unequivocal opposition to any plan of school desegregation. He even expressed hostility to a voluntary open enrollment arrangement although he indicated that he would

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[171] Tr., IV, 394-405.

[172] Stip. #17.

accede to it if other board members saw a need for such a plan.

Dr. Dale Pattison, elected to the board along with Mr. Hoekstra in June of 1971, expressed similar anti-busing sentiments when he testified at the preliminary injunction hearing in August 1971. He wanted to preserve neighborhood schools, but would "permit" "voluntary" integration. He opposed the adopted integration plan on basis that it would increase measles and chicken-pox, was too costly, had falsely labeled the community as "racist," was "hasty," etc. He testified further that "those who . . . invested thousands of dollars in a home have more right to a school right around the block . . . from that home than those who go into large apartment complexes."[173]

Finally, Board President Alan Tyler, as previously noted, commented at the very time of the July 6 resolution that he saw no purpose to a mere "postponement" because he was categorically opposed to alteration of the neighborhood school zones as then drawn. Nothing in his subsequent behavior or testimony contradicts this philosophy.

The court also notes the position and understanding of the major organized opposition to the May 7 plan, which was also the major organized support for those board members who voted for and who subsequently supported the July 6 resolution. The National Association for the Advancement of Neighborhood Schools was formed in 1971 by a nucleus of campaign workers who had actively supported Mr. Jack Hoekstra and Dr. Dale Pattison, and who later supported Mr. Robert Keller and Mrs. Barbara Marr. All of these candidates for election ran on a strong anti-busing platform.

On March 5, 1973, the Association officially wrote to the Kalamazoo Board of Education on the subject of a possible settlement of the case presently before the court. After reminding the board members that Mr. Hoekstra, Dr. Pattison, Mr. Keller, and Mrs. Marr had been elected with its help and support, the Associa-

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[173] Preliminary Injunction, Tr., III, 505-511, 537-544, and esp. 537, 540, 541, 542.

tion demanded that the Kalamazoo board enter into no compromise settlement. In addition, the letter noted that "in July, 1971, . . . the new board *rescinded* the earlier board's decision to bus."[174]

The Association thus indicated its belief that the July 6 resolution was a rescission, and applied its considerable and perhaps decisive political influence with the board majority to assure that nothing would be done to save integration in Kalamazoo.

It is therefore abundantly clear that at the time of the July 6 resolution and at all times since, the Kalamazoo Board of Education has been unamenable to any effective measures to significantly reduce the degree of racial segregation present in the schools before May 7, 1971. The board's position, therefore, was and is resolutely supportive of a complete retreat from state governmental initiatives which culminated in formal desegregation of the Kalamazoo public schools.

In light of these facts, this court earnestly reiterates its previous ruling that the July 6, 1971 resolution of the Kalamazoo Board of Education was an act of rescission repugnant to the Fourteenth Amendment to the Constitution. The court would again note the similar findings and conclusions recorded in *Keyes, supra,* 303 F. Supp. 289, 313 F. Supp. 61, *aff'd. supra,* 445 F.2d 990, cert. denied as to this portion, 41 U.S.L.W. at 5003, and in *Bradley, supra,* 433 F.2d 897.

In *Keyes,* the facts were almost identical to those presently before this court. The defendant school board adopted a plan of desegregation, a school board election was held, and, before the desegregation plan could be implemented, the new board nullified that plan. The court found, at the time of granting a preliminary injunction, that the rescissionary resolution "was a legislative act which had for its purpose restoration of the old status quo and was designed to perpetuate segregation in the affected areas." *Supra,* 303 F.Supp. at 295. The court accordingly found this to be an act of "de jure" segregation. Following a trial on the merits, the court further rejected the notion that no rights had vested under

[174] Pl. Ex. 1820. Emphasis supplied.

the desegregation plan due to the fact that it was nullified before actual implementation.

> "True, the (desegregation) resolutions had not been carried out, but extensive preparations were in progress. In any event, this cannot be made to turn on any property right analogy. Plaintiffs were deprived of a right to seek and possibly attain equality." *Supra*, 313 F.Supp. at 67.

This is precisely the situation in the instant case.

Likewise, the Sixth Circuit Court of Appeals has affirmed the principle that legislative actions which retard desegregation progress are unconstitutional. *Bradley, supra.* Put very succinctly:

> "State action cannot be interposed to delay, obstruct or *nullify* steps lawfully taken for the purpose of protecting rights guaranteed by the Fourteenth Amendment." *Supra*, 433 F.2d at 903. (Emphasis supplied.)

Therefore, even if the July 6 resolution is taken to be a mere postponement, and not a full rescission, it is still unconstitutional under the terms of the Bradley decision, supra.

At trial, defendants have attempted to distinguish Bradley on the grounds that that decision merely held unconstitutional the effort of one legislative body, the state legislature, to tie the hands of another legislative body, the Detroit Board of Education. This reading of Bradley, of course, fails to distinguish the factually more parallel Keyes decision, and, further, is untenable. The basis of the ruling in Bradley was a finding of a violation of the equal protection clause of the Fourteenth Amendment, not some kind of infringement of local school board sovereignty. The plaintiffs awarded relief in Bradley were school children and their parents, not the local school board.

This court therefore finds at this time that the July 6, 1971 resolution of the Kalamazoo Board of Education had a purpose and effect so profound that it alone would necessitate a judgment

for plaintiffs in this cause. [175] In accordance with the findings set forth at length earlier in this opinion, however, the court finds that this unconstitutional act also compounded defendants' many other constitutionally impermissible actions in contributing to the inequity inherently incident to racially segregated education in Kalamazoo.

The court further concludes that the July 6 rescission of the May 7 desegregation plan was itself an act of de jure segregation committed by the Kalamazoo Board of Education, with the knowledge but without the opposition of the State Board of Education. [176] The foreseeable, necessary, and direct effect of the July 6 action was to recreate a dual system by resegregating the schools. Bradley, supra, Nos. 72-1809-1814, at 73. This action literally transformed an integrated system (albeit a very new one) into a racially segregated system in direct contravention of the United States Constitution and the ruling of the Supreme Court in Brown I, supra.

The inclusion of the voluntary open enrollment provision in the July 6 resolution will not remove the rescission's constitutional infirmities. The United States Commission on Civil Rights has reported, "One of the primary reasons school districts under-

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[175] The effect of the July 6 action and the surrounding circumstances of hostility to desegregation extended beyond the assignment of students to particular schools. Three days after the resolution, July 9, the new Board sought and obtained the resignation of Superintendent of Schools John Cochran. See this court's earlier opinion at 346 F. Supp. 774. The cumulative effect of these new board policies and attitudes resulted in the departure from the Kalamazoo system of several experienced and able administrators. Dr. Reed Hagen, Assistant Superintendent under Dr. Cochran and acting Superintendent for a year after Dr. Cochran's departure, left in June of 1972. At the same time, William B. Cansfield, Director of Student Personnel, and Dr. Charles Warfield, Director of Human Relations, left the system with public expressions of dissatisfaction with the new board's attitude toward those favoring desegregation. See Pl. Ex. 1086. This is precisely the kind of "chilling effect" which this court anticipated in its earlier opinion and which surely further detracted from the quality of services which the Kalamazoo Board of Education was able to subsequently provide.

[176] Pl. Ex. 123. During the testimony of Marvin Tableman, the parties stipulated on the record that there was no response from the State Board on learning of the Kalamazoo board's July 6 action.

going desegregation favor freedom-of-choice plans is that they do not work." [177] The Supreme Court has noticed that the "general experience under 'freedom of choice' to date has been such as to indicate its ineffectiveness as a tool of desegregation," and has held, "if there are reasonably available other ways, such for illustration as zoning, promising speedier and more effective conversion to a unitary, nonracial school system, 'freedom of choice' must be held unacceptable." Green, supra, 391 U.S. at 440-441. See also Raney v. Board of Education, 391 U.S. 443, 20 L.Ed. 2d 727, 88 S.Ct. 1697 (1968); Monroe v. Board of Commissioners, 391 U.S. 450, 20 L.Ed. 2d 733, 88 S.Ct. 1700 (1968); Swann, supra, 402 U.S. at 7.

Considering the circumstances surrounding the adoption of the July 6 voluntary open enrollment provision, the court concludes that it was not intended to operate as an effective desegregation device. [178] The voluntary open enrollment plan was intended to be an empty gesture toward compliance with the requirements of the Constitution, while the reality was that the May 7 desegregation plan was being effectively rescinded and nullified.

This court also finds that on and after July 6 the May 7 plan was, to say the least, a "reasonably available" way to achieve a "speedier and more effective conversion to a unitary, nonracial school system" as required by the Constitution than the voluntary open enrollment plan. *Green, supra,* 391 U.S. at 441.

V.

The May 7 desegregation plan necessarily involved some transportation of students to fulfill its goals of providing equal educational opportunity for all children. In Kalamazoo, as in other cities which have taken affirmative action to end unconstitutional

[177] "Federal Enforcement of School Desegregation" 15 (Sept. 11, 1969).

[178] According to Mr. Morgan, Preliminary Injunction Hearings, Tr., II at 444, the Kalamazoo schools invited parents to enroll their children in the voluntary enrollment plan during the month of August 1971. Only 15 pupils out of about 18,000 had elected to participate when this court issued its temporary restraining order. However, the court notes that August is vacation time for many families and that the enrollment period had not ended when the court acted, so this low number may not precisely reflect the response of Kalamazoo parents to the voluntary open enrollment plan.

segregation, the factor of transportation of students has often been exaggerated and distorted by the opponents of integration.

To keep the matter in its proper factual perspective, it is appropriate to review the historical and contemporary role of student transportation in our country's educational system.

Chief Justice Burger in his opinion for the Court in Swann, supra, declared:

> "Bus transportation has been an integral part of public transportation for years, and also perhaps the single most important factor in the transition from the one-room school house to the consolidated school. . . .
>
> "The importance of bus transportation as a normal and accepted tool for educational policy is readily discernible. . . ." 402 U.S. at 29.

In his partial concurrence in Keyes, supra, Justice Powell observed, "The transportation of school children is as old as public education, and in rural and in some urban settings it is as indispensible as the providing of books." 41 U.S.L.W. at 5017.

Furthermore, as the Fifth Circuit observed, "Private schools do not disdain busing." *United States* v. *Texas Education Agency, supra*, 467 F.2d at 874. States may provide transportation for parochial school students if it does so for public school students. Everson v. Board of Education, 330 U.S.1, 91 L.Ed. 711 (1947).

All authorities agree that the proportion of public school children who are transported is substantial. Chief Justice Burger put the figure at approximately 39%, or eighteen million, in 1969-70. Swann, supra, 402 U.S. at 29. Mr. Justice Powell estimated that "half of all America's children ride buses to school *for reasons unrelated to integration.*" Keyes, supra, 41 U.S.L.W. at 5017. (Emphasis supplied.) And Justice Powell noted, Senator Abraham Ribicoff of Connecticut has put the figure at two-thirds. Id. at n. 22.

The important thing is that, nationally, nearly all transportation of students has nothing to do with desegregation. It has

been estimated that only three per cent of all school transportation is for purposes of integration.

Kalamazoo has not been out of step with the rest of the nation. As noted previously, in September 1967 the Kalamazoo board, *responding to a clear public demand*, established a system of transportation of all students who lived over a mile and a half from school. [179] During 1970-71, the board transported at public expense, 11.7% of all the public elementary school children and 39% of all the public junior high school children for reasons other than safety or integration. [180]

The transportation of students to schools some distance away is not entirely without some burden to students and parents. When a child lives some distance from and must be transported to school, his ability to participate in extra-curricular activities is diminished. Similarly, it may be more difficult in some instances for parents to participate in school-related activities. However, the distances involved in Kalamazoo are never great, and these circumstances have never been regarded as presenting serious difficulties.

Those who oppose transportation of students for purposes of integration cite these reasons. However, it is inconsistent for people to demand, or at least accept, the massive transportation of students for all sorts of reasons except integration. Transportation for purposes other than integration has all the inconveniences and disadvantages of transportation for purposes of integration. Since all transportation of students is on a par in this respect the objections to transportation for purposes of integration must be racially related.

Of course, all else being equal, the concept of maintaining schools within walking distance seems convenient to those affected and therefore attractive. However, all things are not equal in a district which has a history of de jure segregation, Swann, supra, 402 U.S. at 28, or in a district which has raised expectations of equal education by proceedings to protect rights guaranteed by the Fourteenth Amendment, Bradley, supra, 435 F.2d at 902.

When the inequities imposed by racially segregated schools are in the balance, the convenience of schools within walking

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[179] Supra at 33.

[180] KBE Ex. 1981. Pl. Ex. 289.

distance cannot be accorded overriding weight. Especially in a district as compact as Kalamazoo, which testimony indicates may be traversed from corner to corner in about a half hour, some practical adjustments must be made to remedy the greater need, one of the constitutional dimensions.

The May 7 plan does require some transportation beyond that previously provided by the Kalamazoo Public Schools in order to alleviate the segregated conditions existing when the plan was adopted. However, the plan itself is really very modest, and the extent of additional transportation must not be exaggerated. According to the defendant Kalamazoo Board of Education, only about 3,717 additional students have been transported as a result of the implementation of the May 7 plan. [181] Since the Kalamazoo schools transported a total of 10,918 students during the 1972-73 school year, [182] the proportion transported because of the integration plan is only a little over one-third.

Even though the May 7 plan was somewhat modest, the court notes that it was *voluntarily* adopted by responsible Kalamazoo school authorities in a bona fide effort to bring substantial equality of opportunity to all children in Kalamazoo as mandated by the Constitution. Where local authorities responsibly perform their duties under the Constitution, and do not act to deprive individuals of their constitutional rights, in the absence of persuasive countervailing evidence, this court ought not and did not change the plan. Under these circumstances, the court approves the May 7, 1971 plan.

The United States Commission on Civil Rights is a legally constituted Presidential Citizens study agency ordained by Executive Order to consider race relations and make recommendations. Its "Your Child and Busing" Report is in evidence. Its concluding remarks are a clear and direct statement of the present situation and the alternative courses facing our country. It is worthy of judicial notice and deliberate consideration.

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[181] TR., XXII, 4321-4322.

[182] KBE Ex. 1981

"For 50 years, the school bus has been a friendly figure – an accepted and vital part of the American educational picture. Without the bus, millions of Americans would have had to rely on the limited educational offerings of one-room schools. Some might never have completed school.

"Now, because it is being used to carry out desegregation plans, some suddenly have cast the familiar yellow bus as a villain. It is a reversal of roles that cannot but trouble thoughtful Americans.

"*The basic issue is not busing but integration.* Either we continue moving toward the goal of integration, or we reject it and hold onto the separate schooling outlawed in the *Brown* decision. For in rejecting busing in the racially segregated situation in which most Americans live today, we also reject integration.

"Instead of resisting busing, the Nation should seek to follow the example of some 30 seventh graders at Jefferson Junior High School in Pontiac, Michigan. After buses were burned, schools were picketed, and children were called insulting names, the seventh graders decided to come to the defense of busing and integration in that city. They formed a biracial organization, called 'The Group,' which travels from school to school, putting on skits and conducting other activities in behalf of racial harmony in Pontiac. Their slogan:

'We Can Make It Work.'

"It is a motto worthy of parents, educators, all branches of government, and the Nation as a whole." [183]

VI.

Plaintiffs have asked the court to grant attorney fees in this case. In light of the Supreme Court's recent action in Northcross v. Memphis Board of Education, 41 U.S.L.W. 3635 (June 4, 1973), the court will reserve decision on this issue. In Northcross, a school desegregation case, the Supreme Court remanded to the

[183] United States Civil Rights Commission, "Your Child and Busing," 35-36 (May 1972); Pl. Ex. 1667.

Sixth Circuit for specific findings on the issue of the propriety of a denial of attorney fees in the case.

The entire content of this opinion embodies the findings of fact and conclusions of law in lieu of those required by Fed. R. Civ. P. 52.

SUMMARY CONCLUSIONS

The following is not all-inclusive, but simply a brief summary of the court's conclusions. This summary is not intended to limit, replace or modify its previously stated findings.

The Kalamazoo Public Schools historically, and especially in recent times, have been racially segregated at all levels of the school system and at a significant number of schools. Segregation here means disproportionate racial concentration.

As a matter of fact and law, this condition of segregation resulted in unequal educational opportunities for Black and White students. Brown I, supra.

In the period before May 7, 1971, the Kalamazoo Board of Education did not resolutely and consistently follow a "neighborhood school policy." A glance at the attendance boundary map reveals that elementary schools were not situated and boundaries were not drawn in a fashion which regularly placed students in the schools closest to their homes. The standard size of 13 grade and kindergarten classrooms was often departed from. Both junior and senior high attendance zones were too large to represent "neighborhoods" within the commonly understood meaning of that term. A substantial number of elementary, junior high, and senior high school students lived more than 1-1/2 miles from school and were transported at district expense beginning in 1966-67.

From at least the middle 1950's until the early 1970's the Kalamazoo Board of Education followed a purposeful pattern of racial discrimination by intentionally creating and maintaining segregated schools in Kalamazoo. The Kalamazoo Board thus denied Black children equal educational opportunities and thus denied them equal protection of the laws within the Fourteenth Amendment of the United States Constitution.

Among other things, the Kalamazoo board deliberately regidified the attendance boundaries of schools attended by the majority of Black students in order to contain the Black students in these schools and to preserve other schools for Whites. The board established optional attendance zones in some transitional areas to allow White students to opt out of a school with a relativley high proportion of Black students and to go instead to a school with a lower proportion of Black students.

The board's site location and school construction policies likewise served to intentionally create and maintain segregated schools in Kalamazoo. In 1959, the board constructed Northglade Elementary and Indian Prairie Elementary schools within about two miles of each other with conscious knowledge that Northglade would be predominantly Black and Indian Prairie predominantly White.

In the late 1950's and early 1960's, the board went into an extraordinarily close association with a real estate developer in the development of Arcadia subdivision. The board not only purchased a school site in Arcadia before many houses were built there, but allowed the developer to put up a sign advertising the fact that a new school was to be built in the subdivision. As a result, many Whites were drawn to the area, and, predictably, Arcadia School was predominantly White.

Thus, the Kalamazoo board was not only acting to maintain the segregated character of Kalamazoo schools, but was intentionally acting in such a way as to promote and create a segregated residential pattern.

The Kalamazoo board's additions of permanent and portable classrooms likewise served to intentionally maintain segregated schools.

The board's policies of assigning most Black teachers to disproportionately Black schools accentuated the racial identifiability of these schools, and was itself unconstitutional discrimination.

The board's responsibility and liability for segregated conditions exists apart from the actions of any other public or private institution or individuals.

Especially up to 1967, the Kalamazoo board's conscious neglect and failure to act when opportunities presented themselves contributed substantially to the growth and maintenance of segregated conditions in the schools. Since 1954, 68 school construction projects and 32 attendance boundary adjustments have been made in Kalamazoo. Despite the fact that virtually every such project or alteration potentially afforded an opportunity to confront the inequities which inhere in a segregated situation, defendants concede that at no time before 1966 did the board formally and publicly consider any program, or make any decision, or implement any policy designed to positively confront the problem of racial isolation in the Kalamazoo public schools. In light of the clear notice and requirement given to all school boards by Brown I, this failure to act was itself a deliberate decision to forego its opportunity to correct the existing segregated conditions. By its intentional acts of commission and omission, the Kalamazoo Board of Education denied Black and White children equal protection of the laws.

In Kalamazoo, the actions of multiple state governmental bodies, many of them apparently in violation of the Constitution, joined with actions of a similar character by federal agencies and with the actions of private institutions to produce segregated conditions in Kalamazoo. The fact that many public and private institutions made deliberate and substantial contributions to neighborhood and school segregation in Kalamazoo does not excuse the State Board of Education, the Superintendent of Public Instruction, and the Kalamazoo Board of Education from liability for their violation of the Constitution of the United States and the Constitution of the State of Michigan. The State of Michigan cannot parcel out its jurisdiction and deliberately achieve by bits and pieces what it could not do directly by statute. When such a situation is alleged to exist, the court must look closely at the actions of each agency to determine whether it has met its constitutional responsibilities. To allow each agency to plead constitutional violations of other agencies in exculpation of its own, would be to mock the Constitution of the United States and the Constitution of the State of Michigan.

Under the Michigan Constitution of 1908, the Superintendent of Public Instruction was given general supervisory

authority over public education in Michigan. Under the Constitution of 1963, the State Board of Education and the Superintendent, as its chief executive officer, have been given this authority. At least since the date of the Brown decision, 1954, the Superintendent and the Board have been aware of segregation in Michigan public schools. The Superintendent and State Board, although sometimes issuing promising statements, have persistently failed to act in a meaningful way to ameliorate the situation, except for the short period after adoption of the new State Constitution. This fact compels the conclusion that the State of Michigan, through the defendant State Board and the defendant Superintendent of Public Instruction, has intentionally sanctioned the segregation of schools by local boards, and has made substantial contribution to the creation and maintenance of segregated public schools in Kalamazoo and elsewhere.

The adoption of the May 7 plan by the Kalamazoo Board of Education was intended to be and was in fact an implementation of the Fourteenth Amendment of the United States Constitution, the mandatory antidiscrimination clauses of the Michigan Constitution of 1963, Art. I, Sec. 2, and Art. VIII, Sec. 2, which were themselves implementations of the Fourteenth Amendment, and the 1966 Joint Policy Statement of the Michigan Civil Rights Commission and the State Board of Education. Apart from the question of whether the Kalamazoo board was constitutionally required to adopt the May 7 plan or something substantially the same, the board's actions were "proceedings to protect the rights guaranteed to members of all races under the Fourteenth Amendment." Bradley, supra, 433 F.2d at 902.

Since the Kalamazoo School Board's discrimination against Black children existed before and at the time of the adoption of the May 7, 1971 action to desegregate its dual school system, the May 7 board was performing its constitutional duty by the creation and implementation of the May 7 integration plan.

Because the Kalamazoo Board of Education, the State Board of Education, and the Superintendent of Public Instruction by their intentional acts and failures to act contributed substantially to the creation and maintenance of segregated schools in Kalamazoo, the May 7, 1971 desegregation plan, or a substantially similar program, was constitutionally required.

The May 7, 1971 plan was the result of several years of public discussion of the problem of segregated schools in Kalamazoo. It was immediately preceded by intensive exploration by the Board and extensive debate by the public. The May 7, 1971 plan was thus not adopted in undue haste, and was not arbitrary or capricious.

Insofar as desegregation was constitutionally required, the Kalamazoo board was fulfilling its constitutional mandate to act with "all deliberate speed" to put an end to segregation in its schools. Brown II, supra.

The Kalamazoo Board of Education's July 6, 1971 resolution was intended to be and was in fact a rescission of the May 7, 1971 desegregation plan.

Even if the July 6, 1971 resolution was not a full rescission, the resolution was action to impede, delay or frustrate proceedings to protect the rights guaranteed to members of all races under the Fourteenth Amendment, and was therefore constitutionally impermissive. Bradley, supra, 433 F.2d at 902.

The Kalamazoo Board of Education's July 6, 1971 resolution was itself an act of de jure segregation committed by the Kalamazoo Board of Education, with the knowledge but without the opposition of the State Board of Education. The foreseeable, necessary, and direct effect of the July 6 action was to recreate a dual system by resegregating the schools. This action literally transformed an integrated system (albeit it a very new one) into a racially segregated system in direct contravention of the United States Constitution and the ruling of the Supreme Court in Brown I, supra, Bradley, supra, 72-1809 - 1814, at 73; Green v. County School Board, 391 U.S. 430, 439-441.

The Kalamazoo Board of Education's July 6, 1971 resolution had such a purpose and had an effect so profound that it alone would necessitate a judgment for the plaintiffs in this cause.

The Kalamazoo Board of Education's July 6, 1971 action compounded the effects of the board's earlier constitutionally impermissible actions.

The inclusion of the voluntary open enrollment provision in the Kalamazoo Board of Education's July 6, 1971 resolution will not remove the resolution's constitutional infirmities. The voluntary open enrollment plan was not intended to operate as an effective desegregation device.

Although the May 7, 1971 desegregation plan was somewhat modest, it was *voluntarily* adopted by responsible Kalamazoo school authorities in a bona fide effort to bring substantial equality of opportunity to all children in Kalamazoo as mandated by the Constitution. Since the Kalamazoo authorities were responsibly performing their constitutional duties when they adopted the May 7 plan, this court has also adopted it as the basis for its remedy.

The segregated conditions which existed in Kalamazoo before the adoption of the May 7, 1971 desegregation plan were vestiges of slavery.

COURT ORDER

As in any school desegregation case where violation of the Fourteenth Amendment has been found, the primary responsibility for providing a remedy lies with the school authorities. In this case, the Kalamazoo Board of Education, the State Board of Education, and the Superintendent of Public Instruction have operational responsibility for providing education to the children of Kalamazoo.

The court adopts the basic concept of the May 7, 1971 plan, and makes permanent its preliminary injunction issued on August 25, 1971, subject to the modifications hereinafter detailed. The Kalamazoo Board of Education, the State Board of Education, and the Superintendent of Public Instruction, Dr. John W. Porter, are enjoined to continue the operation of the plan as presently implemented, subject to the following qualifications. Since it appears from the record that the present junior high feeder pattern is administratively inconvenient and can be altered to eliminate this inconvenience in accordance with the basic concept of the May 7 plan, the court will hold a hearing on this matter at a date and time to be set.

The court retains continuing jurisdiction to supervise implementation of the plan. Any party may move for amendment or alteration of the plan from time to time if there is a change in circumstances. The party moving for such modification shall have the burden of justifying the changes.

The defendants Michigan State Board of Education and Superintendent of Public Instruction, Dr. John W. Porter, are enjoined from taking any action which will in any manner recreate or perpetuate segregated, racially identifiable schools in Kalamazoo in contravention of the May 7, 1971 plan as adopted by this court. These defendants are further enjoined to render such positive assistance as may be helpful to the Kalamazoo Board of Education in the execution of the Order of this court, providing such assistance is within the constitutional and statutory duties and authorities of the State Board of Education and Superintendent of Public Instruction, respectively.

The Kalamazoo Board of Education is further ordered to apply to the federal government for such financial assistance as may be available to aid the Board in executing the present Order of this court. The Kalamazoo Board of Education is also ordered to make application to the Legislature of the State of Michigan for financial assistance to aid the Board in executing the Order of this court.

The State Board of Education and the Superintendent of Public Instruction are ordered to make, and help as necessary in the preparation of, applications to the federal government for such financial assistance as may be available to aid all parties in the execution of the present Order. These defendants are further ordered to join with the Kalamazoo Board of Education in making application to the Legislature of the State of Michigan for financial assistance.

IT IS SO ORDERED.

/s/ NOEL P. FOX
Chief Judge,
United States District Court

Dated: October 4, 1973

APPENDIX A

CONSTITUTION OF UNITED STATES

AMENDMENT XIV.

§ 1. Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The relevant portion of this section is: "No state shall * * * deny to any person within its jurisdiction the equal protection of the law." This language is plain, simple, English, and ought to be easily interpreted.

The Supreme Court in *Brown* v. *Board of Education*, 347 U.S. 483, 490, stated:

> In the first cases in this Court construing the Fourteenth Amendment, decided shortly after its adoption, the Court interpreted it as proscribing all state-imposed discriminations against the Negro race. [5]

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[5] *Slaughter-House Cases*, 16 Wall. 36, 67-72 (1873); *Strauder* v. *West Virginia*, 100 U.S. 303, 307-308 (1880):

> "It ordains that no State shall deprive any person of life, liberty, or property, without due process of law, or deny to any person within its jurisdiction the equal protection of the laws. What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color? The words of the amendments, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race, – the right to exemption from unfriendly legislation against them distinctively as colored, – exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discrimination which are steps towards reducing them to the condition of a subject race."

See also *Virginia* v. *Rives*, 100 U.S. 313, 318 (1880); *Ex parte Virginia*, 100 U.S. 330, 344-345 (1880).

The following are excerpts from cases cited in *Brown*:

Ex parte Virginia explained the purpose of the Amendment:

> One great purpose of these amendments was to raise the colored race from that condition of inferiority and servitude in which most of them had previously stood, into perfect equality of civil rights with all other persons within the jurisdiction of the States. They were intended to take away all possibility of oppression by law because of race or color. They were intended to be, what they really are, limitations of the power of the States and enlargements of the power of Congress. They are to some extent declaratory of rights, and though in form prohibitions, they imply immunities. * * *.

Supra, 100 U.S. at 344-345.

Strauder continues:

> "This [the Fourteenth Amendment] is one of a series of constitutional provisions having a common purpose; namely, securing to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the superior race enjoy. The true spirit and meaning of the amendments, as we said in the *Slaughter-House Cases* (16 Wall. 36), cannot be understood without keeping in view the history of the times when they were adopted, and the general objects they plainly sought to accomplish. At the time when they were incorporated into the Constitution, it required little knowledge of human nature to anticipate that those who had long been regarded as an inferior and subject race would, when suddenly raised to the rank of citizenship, be looked upon with jealousy and positive dislike, and that State laws might be enacted or enforced to perpetuate the distinctions that had before existed. Discriminations against them had been habitual. It was well known that in some States laws making such discriminations then existed, and others might well be expected. The colored race, as a race, was abject and ignorant, and in that condition was unfitted to command the respect of those who had superior intelligence. Their training had left them mere children, and as such they

needed the protection which a wise government extends to those who are unable to protect themselves. They especially needed protection against unfriendly action in the States where they were resident. It was in view of these considerations the Fourteenth Amendment was framed and adopted. *It was designed to assure to the colored race the enjoyment* of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the States. It not only gave citizenship and the privileges of citizenship to persons of color, but it denied to any State the power to withhold from them the equal protection of the laws, and authorized Congress to enforce its provisions by appropriate legislation. To quote the language used by us in the *Slaughter-House Cases*, "No one can fail to be impressed with the one prevading purpose found in all the amendments, lying at the foundation of each, and without which none of them would have been suggested,—we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over them." * * *

If this is the spirit and meaning of the amendment, whether it means more or not, it is to be construed liberally, to carry out the purposes of its framers. * * *

* * * If in those States where the colored people constitute a majority of the entire population a law should be enacted excluding all white men from jury service, thus denying to them the privilege of participating equally with the blacks in the administration of justice, we apprehend no one would be heard to claim that it would not be a denial to white men of the equal protection of the laws. Nor if a law should be passed excluding all naturalized Celtic Irishmen, would there be any doubt of its inconsistency with the spirit of the amendment.

Supra, 100 U.S. at 306-308.

APPENDIX B

56 Bradley et al v. Milliken, et al. Nos. 72-1809-14

A. Status of School Districts under Michigan Law

This conclusion is supported by the status of school districts under Michigan law and by the historical control exercised over local school districts by the legislature of Michigan and by State agencies and officials, which we now discuss.

As held by the District Court, it is well established under the Constitution and laws of Michigan that the public school system is a State function and that local school districts are instrumentalities of the State created for administrative convenience.

The Northwest Ordinance of 1787 governing the Territory of Michigan provided:

> "Religion, morality and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." Art. III.

With this genesis, Michigan's four Constitutions have clearly established that the public school system in that State is solely a State function. The Constitution of 1835 in Article X, Section 3, provided, in part: "The legislature shall provide for a system of common schools . . ." The Constitution of 1850, Article XIII, Section 4, provided, in part: "The legislature shall . . . provide for and establish a system of primary schools . . ." Section 1 of the same Article provided, ". . . the Superintendent of Public Instruction shall have Nos. 72-1809-14 *Bradley et al* v. *Milliken et al.* 57 general supervision of public instruction . . ."

The Constitution of 1908 in Article XI, Section 2, provided that the Superintendent of Public Instruction "shall have general supervision of public instruction in the State." Article XI, Section 9, provided, in part as follows:

> "The legislature shall continue a system of primary schools, whereby every school district in the State shall provide for the education of pupils without charge for tuition . . ."

The Constitution of 1963, the present Constitution of the State of Michigan, in Article VIII, Section 2, provides, in part, as follows:

"The legislature shall maintain and support a system of free public elementary and secondary schools as defined by law."

In interpreting the above educational provisions of the Constitution of 1850, the Michigan Supreme Court stated: "The school district is a State agency. Moreover, it is of legislative creation . . ." *Attorney General* v. *Lowrey*, 131 Mich. 639, 644, 92 N.W. 289, 290 (1902). Again, interpreting the Constitution of 1850, the Supreme Court of Michigan in *Attorney General* v. *Detroit Board of Education*, 154 Mich. 584, 590, 118 N.W. 606, 609 (1908), adopted lower court language which read:

> "Education in Michigan belongs to the State. It is no part of the local self-government inherent in the township or municipality, except so far as the legislature may choose to make it such. The Constitution has turned the whole subject over the legislature . . ."

The Supreme Court of Michigan interpreted Article XI, Section 9, of the Constitution of 1908 to mean:

> "The legislature has entire control over the schools of the State subject only to the provisions above referred to. The division of the territory of the State into districts, the conduct of the school, the qualifications of teachers, 58 *Bradley et al* v. *Milliken et al* Nos. 72-1809-14 the subjects to be taught therein are all whin its control. *Child Welfare* v. *Kennedy School Dist.*, 220 Mich. 290, 296, 189 N.W. 1002, 1004 (1922).

In the leading case concerning construction of this section of the Michigan Constitution of 1963, the Michigan Supreme Court said:

> "It is the responsibility of the State board of education to supervise the system of free public schools set up by the legislature and, as a part of that responsibility, to promulgate regulations specifying the number of hours necessary to constitute a school day for elementary school students as well as for other classifications or groupings of students, to determine the curricula and, in general, to exercise leadership and supervision over the public school system." *Welling* v. *Livonia*

Board of Education, 382 Mich. 620, 624, 171 N.W.2d 545, 546 (1969). See also *Governor* v. *State Treasurer*, 389 Mich. 1, 13, 203 N.W.2d 457 (1972).

Michigan has not reated its school districts as sacrosanct. To the contrary, Michigan always has regarded education as the fundamental business of the State as a whole. Local school districts are creatures of the State and act as instrumentalities of the State under State control. *Cf. Senghas* v. *L'Anse Creuse Public Schools*, 368 Mich. 557, 118 N.W.2d 975 (1962); *McLaughlin* v. *Board of Education*, 255 Mich. 667, 239 N.W. 374, (1931).

The record discloses a number of examples of State control over local public education in Michigan.

1. Following the holding of *Welling* v. *Livonia Board of Education, supra*, that there was no minimum length of day required under the 180-day school attendance rule absent a State Board of Education regulation, the Michigan State Board of Education, acting under its Constitutional mandate without legislative authority, established an administrative rule requiring local school boards to provide a minimum Nos. 72-1809-14 *Bradley et al* v. *Milliken et al* 59 number of hours per school year. See, *School Districts Child Account for Distribution of State Aid*, Bulletin No. 1005, Michigan State Department of Education (1970).

2. Public Act 289 of 1964 (MSA §15.2299 (1) *et seq.*, MCLA §388.681 *et seq.*) required Michigan school districts to operate K-12 systems. When Public Act 289 became effective, 1,438 public school districts existed in Michigan. By the beginning of 1968, this figure had been reduced to 738, meaning that 700 school districts in Michigan have disappeared since 1964 through reorganization. Annual Report, Committee on School District Reorganization, 1968 Journal of the Senate 422-423 (March 1, 1968).

3. Pursuant to Act 289 of 1964, *supra*, the State Board of Education ordered the merger of the Brownstown No. 10, Hand, Maple Gorve and Carson school districts, all in Wayne County. The action is best explained by the fact that Brownstown was, at that time, the wealthiest school district in the State, indeed, with a property valuation of $340,000 backing each child, perhaps the

wealthiest district in the nation, while the other three districts were extremely poor.

4. When the Sumpter School District was on the verge of bankruptcy in 1968, the State Board of Education, acting under Public Act 239 of 1967 (MSA §15.2299(51) *et seq.*, MCLA §388.691 *et seq.*), merged the district with four adjoining districts, including the Airport School District. Signficantly, though Sumpter was in Wayne County, Airport was in Monroe County, showing that county lines are not inviolate in Michigan.

5. The Nankin Mills School District in Wayne County was beset with financial problems and had no high school. Again, pursuant to Act 239, the State Board of Education in 1969 ordered this school district to merge with the Livonia, Garden City and Wayne Community schools.

6. When the Inkster School District in Wayne County was on the verge of financial bankruptcy, the Michigan legislature 60 *Bradley et. al.* v. *Milliken et al.* 72-1809-14 passed Public Act 32 of 1968 (MSA §15.1916 *et seq.*, MCLA §388.201 *et seq.*) enabling the district to borrow $705,000 but on the condition that if the district could not balance its budget, the State Board of Education could reorganize, merge or annex the district. The legislative history of Act 32 indicates at least two legislators voted against the bill in the House of Representatives because of the excessive control given to the State Board of Education:

> "I voted No on House Bill No. 3332 because in setting up the machinery to bail out distressed districts, it takes from the local communities the control over their own educational system by providing for excessive arbitrary reorganization powers in the hands of the Board of Education. . ."
>
> "This bill certainly sets up the State Board of Education to be a dictator of all school districts that run into financial problems." 1968 Journal of the House of Representatives 1965.

7. Too small and too poor to operate a high school, the all-black Carver School District in suburban Oakland County reached a crisis in 1960 when other surrounding white districts refused to accept Carver pupils on a tuition basis. The Carver district was merged with Oak Park.

8. The State Board of Education and Superintendent of Public Instruction may withhold State aid for failure to operate the minimum school year. MSA §15.3575, MCLA §340.575. In 1970, funds were withheld from the City of Grand Rapids School District. 17 Michigan School Board Journal 3 (March, 1970). For Attorney General Opinions holding that State aid may be withheld by the State Board of Education from school districts for hiring uncertified teachers, defaulting on State loans and for other reasons, see Op. Atty. Gen. No. 880, 1949-1950 Report of the Attorney General 104 (January 24, 1949, Roth); No. 2333, 1955 Report of the Attorney General 561 (October 20, 1955, Kavanaugh); No. 72-1809-14 *Bradley et. al.* v. *Milliken et al.* 61 4097, 1961-1962 Report of the Attorney General 553 (October 8, 1962, Kelley).

9. The State of Michigan contributes, on the average, 34% of the operating budgets of the 54 school districts included in the proposed Metropolitan Plan of Integration. In eleven of the 54 districts, the State's contribution exceeds 50% and in eight more, it exceeds 40%. State aid is appropriated from the General Fund, revenue raised through state-wide taxation, and is distributed annually to the local school districts under a formula devised by the legislature. See, *e.g.*, Public Act 134 (1971), MSA §15.1919(51), MCLA §388.611.

Though the local school districts obtain funds from assessment of local property, the ultimate authority in insuring equalized property valuations throughout the State is the State Tax Commission. MSA §7.631, *et seq.* MCLA § 209.101, *et seq.*; MSA § 7.206, MCLA § 211.148; MSA § 7.52, MCLA § 211.34. The State's duty to equalize is required by the Michigan Constitution, Article IX, Section 3. This "State equalized valuation" serves as the basis for calculating local revenue yields, See, *Ranking of Michigan Public High School – School Districts by Selected Financial Data, 1970*, Bulletin 1012, Michigan State Department of Education (1971).

10. The Michigan School Code reaffirms the ultimate control of the State over public education. Local school districts must observe all State laws relating to schools,[1] hold school a

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[1] MSA §15.3252(c), MCLA §340.252(c).

minimum number of days per year,[2] employ only certified teachers,[3] teach civics, health and physical education and drivers' education,[4] excuse students to attend religious instruction 62 *Bradley et. al.* v. *Milliken et. al.* 72-1809-14 classes,[5] observe State requirements when teaching sex education,[6] make annual financial and other reports to the Superintendent of Public Instruction,[7] adopt only textbooks which are listed with the Superintendent of Public Instruction[8] and must follow all rules and regulations of the State Department of Education.

Local school districts, unless they have the approval of the State Board of Education or the Superintendent of Public Instruction, cannot consolidate with another school district,[9] annex territory,[10] divide or attach parts of other districts, [11] borrow monies in anticipation of State aid,[12] or construct, reconstruct or remodel school buildings or additions to them. [13]

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[2] MSA §15.3575, MCLA §340.575.

[3] MSA §§15.1023 (10)(a), 15.3570, MCLA §§388.1010(a), 340.570.

[4] MSA §§15.1951, 15.3361, MCLA §§388.371, 340.361; MSA §§15.3781-15.3782, MCLA §§340.781-340.782; MSA §9.2511(c), MCLA §257.811(c).

[5] MSA §15.3732(g), MCLA §340.732(g).

[6] MSA §15.3789, MCLA §340.789.

[7] MSA §15.3612, MCLA §340.612; MSA §§15.3616, 15.3688, MCLA §§340.616, 340.688.

[8] MSA §15.3887(1), MCLA §340.887(1).

[9] MSA §15.3402, MCLA §340.402.

[10] MSA §15.3431, MCLA §340.431.

[11] MSA §15.3447, MCLA §340.447.

[12] MSA §15.3567(1), MCLA §340.567(a).

[13] MSA §15.1961, MCLA §388.851, Op. Atty. Gen. No. 1837, 1952-1954 Report of the Attorney General 440 (Nov. 8, 1954).

The power to withhold State aid, of course, effects enormous leverage upon any local school district, since on the average 34 per cent of the operation budget of the 54 school districts included in the proposed Metropolitan Plan is paid for by the State.

In the instance of the City of Detroit, the State exhibited its understanding of its power over the local school district by the adoption of Act 48 of the Public Acts of 1970 which repealed a high school desegregation plan previously adopted by the Detroit Board of Education. See 433 F.2d 897.

APPENDIX C

The Fifth Circuit Court of Appeals, sitting en banc, rejected "the anodyne dichotomy of classical de facto and de jure segregation," in the following language: 16 *Cisneros* v. *Corpus Christi Ind. Sch. Dist*

While there is admittedly no catholicity of viewpoint in the Circuits on the question of intentional state action, this Court has never tempered its prohibition of school board actions that create, maintain, or foster segregation by the requirement that a discriminatory intent be shown. The underpinning of our decisions is a determination of the unlawful effect of state action upon the existence of unitary school systems. *Lee* v. *Macon County Board of Educ.*, 5 Cir. 1971, 448 F.2d 746, 752; *Stout* v. *Jefferson County Board of Educ.*, 5 Cir. 1971, 448 F.2d 403, 404, *citing Cooper* v. *Aaron, supra; Bush* v. *Orleans Parish School Board*, E.D.La. 1960, 190 F. Supp. 861, *aff'd sub nom. City of New Orleans* v. *Bush*, 1961, 333 U.S. 212; *United States* v. *Texas*, E.D. Texas 1971, 330 F. Supp. 235, Part II, *aff'd as modified, United States* v. *Texas*, 5 Cir. 1971, 447 F.2d 441. *See Wright* v. *City of Brighton, Ala.*, 5 Cir. 1969, 441 F.2d 447, *cert. denied* 404 U.S. 915; *Hall* v. *St. Helena Parish School Board*, 5 Cir. 1969, 417 F.2d 801, 807, *cert. denied* 396 U.S. 904; *Henry* v. *Clarksdale Municipal School District*, 5 Cir. 1969, 409 F.2d 682, 687, *cert. denied* 396 U.S. 940.

This principle has now become the law of the land. In *Wright* v. *Council of the City of Emporia*, 1972, ____ U.S. ____ [40 U.S.L.W. 4806, June 20, 1972], the Supreme Court held that the city could not create a new school district separate from that of the surrounding county where "its effect would be to impede the process" of the court-ordered dismantling of a dual school *Cisneros* v. *Corpus Christi Ind. Sch. Dict.* 17 system, *id.* at 4812, finding that under its previous decisions in *Green* v. *County School Board*, 1968, 391 U.S. 430, and *Monroe* v. *Board of Commissioners*, 1968, 391 U.S. 450, school board action must be judged "according to whether it hinders or furthers the process of school desegregation." *Id.* at 4809. Citing with approval our decisions in *Lee* and *Stout, supra*, the Court rejected the "dominant purpose" test adopted by the Fourth Circuit decision

in the case, focusing rather "upon the effect – not the purpose or motivation – of a school board's action in determining whether it is a permissible method of dismantling a dual system. . . . [T]his 'dominant purpose' test," said the Court, "finds no precedent in our decisions." *Id.* at 4810.

Importantly, the dissent voiced no opposition to the discarding of purpose and motivation, but objected only to the majority's factual determination that the action of the city in creating its own school district would impede the progress of desegregation.

School cases serve to emphasize the correctness of this principle, for regardless of motive, the children that suffer from segregation suffer the same deprivation of educational opportunity that *Brown* condemns. No one would suggest that the validity of a segregation law depends upon the legislators' motives in enacting it, or that such a law is unconstitutional only when it can be ascribed to racial animus. Why then the distinction between types of school board action that produce segregation? "[T]he factor of malevolent motivation is farther from the core of invidiousness that condemns explicit racial discrimination than are the odious effects produced." *Goodman, De Facto School* 18 *Cisneros* v. *Corpus Christi Ind. Sch. Dist. Segregation: A Constitutional and Empirical Analysis,* 60 Calif. L. Rev. 275, 291 (1972).

467 F.2d 142, pp. 150-151.

APPENDIX D

Judicial rationalization for the justification of slavery in turn became vestiges of slavery and the rationalization for the continuation of vestiges of slavery likewise in turn became further vestiges of slavery.

The following is a combination of excerpts from The Report of the Select Committee on Equal Educational Opportunity, United States Senate, 92D Congress, 2d Session, Report No. 92-000, pages 191, 192, and 193; The Long Road to Humanity, by Stanton A. Coblentz, Library of Congress Catalog No. 58-10603, at pages 339, 340; and *Schultz* v. *Stark, 238 Mich. 102, at 103-104.*

Chapter 15–School Desegregation and the Law

A. A Brief Background

Since ratification of the 14th Amendment in 1868, racial equality under law has been a fundamental principle of the American legal system. That was not always the case. For over 300 years, virtually all black Americans had been denied the most basic rights of American citizenship. In 1865, nearly 90 percent of all Americans of African descent were slaves. These black people were not American citizens; at law they were considered the personal property of their owners. They were not entitled to the vote, nor to due process of law in the courts. They were not permitted to own possessions, or even to marry without proprietary consent. The average life expectancy of black Americans was two-thirds that of whites.

Perhaps the most graphic description of the total subordination of Negroes in America before the Civil War is provided by the Supreme Court's 1857 decision in *Dred Scott* v. *Sandford,* 60 U.S. 303. There the court invalidated the "Missouri Compromise," an Act of Congress excluding slavery from portions of the Northwest Territories–as an unconstitutional restriction of the property rights of slaveowners and potential slaveowners. Those property

rights were guaranteed against Federal infringement under the due process clause of the 5th Amendment to the U.S. Constitution.

The court held that in the eyes of the Constitution black Americans were:

> ... considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the government might choose to *grant* them.

In the same way, the judicial cases concerning slavery will reveal many unvarnished truths. A resume of a small number will suffice to indicate the complexion of all.

To begin with a case that reflects general attitudes, what constitutes insolence in a slave? This was the question before the court in North Carolina in 1852, in the case of *State* v. *Bill*. And here is the opinion of Justice Nash, of the Supreme Court:

What acts in a slave toward a white person will constitute insolence, it is manifestly impossible to define–it may consist in a look, the pointing of a finger, a refusal or a neglect to step out of the way when a white person is seen to approach. But each of such acts violates the rules of propriety, and if tolerated, would destroy that subordination, upon which our social system rests.

This, certainly, is eloquent. If even a look, or a "refusal or neglect to step out of the way," can be construed as insolence of a type threatening to "destroy that subordination, upon which our social system rests," we can only conclude that the inferiority of the Negro is one of the pillars of society and that a second and equal support is the effort to make a demonstration of that inferiority.

However, we need not judge merely by such an expression of opinion. One of the abhorrent features of slavery in the United States, which subjected it to the most criticism in its own day and which was, in fact, responsible for making many Abolitionists, was the denial of the basic rights of the family, the

liability of the wife to be separated from the husband or the child from the mother, with no more regard for human feelings than if they had been members of a litter of puppies. While many slaveholders would not permit such breaches, the cases tell us time after time of less considerate owners.

Following the Civil War, dramatic changes in the legal status of Negro Americans were attempted through constitutional amendment.

In 1865, the 13th Amendment outlawed slavery and involuntary servitude—except as punishment for crime. Ratification of the 14th Amendment followed in 1868, conferring citizenship on *all* persons born within the United States and guaranteeing the rights of due process of law and equal protection of the laws to all persons. The trilogy of civil rights amendments was completed in 1869 with the 15th Amendment by prohibiting denial of the vote on the basis of race.

These changes in the legal status of racial minorities were not cheaply purchased. They came at the cost of 4 years of Civil War, 520,000 American lives, and sectional bitterness that continues to divide the Nation, although with decreasing force, to the present day.

However, the adoption of the civil rights amendments did not confer immediate equality of legal status upon American blacks. State laws required segregation in public places, restrictive covenants in land deeds prohibiting sale to members of racial minorities, literacy requirements for voting with "grandfather" clauses to protect illiterate whites registered prior to passage of the 15th Amendment, "white primaries", job discrimination, and other discriminatory practices were adopted in much of the Nation to confine blacks to second-class citizenship. And, notwithstanding the civil rights amendments, many of these practices received the express approval of the Federal judiciary. In *Plessy* v. *Ferguson,* 163 U.S. 537, decided in 1896, the Supreme Court led the way. Upholding a Louisiana law requiring separate railway cars for white and Negroes, the court said:

> The object of the [14th amendment was undoubtedly to enforce the absolute equality of the two races before

the law, but in the nature of things, it could not have been intended to abolish distinctions based upon color . . . Laws permitting and even requiring separation, in places where they are the inferiority of either race to the other, and have been generally, if not universally recognized as within the competency of the State legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which have been held to be a valid exercise of the legislative power even by courts of States where the political rights of the colored race have been longest and most earnestly enforced. [Citing *Roberts* v. *City of Boston,* 5 Cush. 198 (1894).]

The court continued:

We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it . . . Legislation is powerless to eradicate racial instincts, or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulty of the present situation.

FELLOWS, J. It is settled by former decisions of this court that a restraint upon occupancy of the lost of a subdivision by colored persons is valid and enforceable (*Parmalee* v. *Morris,* 218 Mich. 625 [38 A. L. R. 1180]), although a restraint upon alienation to a colored person is void (*Porter* v. *Barrett,* 233 Mich. 373). The fact that defendants are colored persons is estalbished by their own admissions while on the witness stand and by the finding to that effect by the trial judge who saw them in court. The record does disclose, however, that Mrs. Starks is quite light colored, and she testified that many, many times she has been taken for a white woman. Mr. Starks is a parlor car conductor on the Pere Marquette. Defendants appear to be thrifty.

Meaningful enforcement of the civil rights amendments has taken place only in the last quarter century.

Perhaps the decisive moment was the Supreme Court's crucial decision in *Shelly* v. *Kramer*, 334 U.S. 1 (1948), that the equal protection clause prohibits enforcement by State courts of land deed restrictions prohibiting the transfer of land to members of racial minorities.

In the area of education, three cases* required the admission of Negro students to State-run white institutions of higher education—on the ground that educational opportunities of equivalent value were not made available in State-run schools for black students. The the dam broke in 1954, with *Brown* v. *Board of Education*. There the court ruled maintenance of officially segregated public schools unconstitutional—even where State and local authorities have attempted in good faith to provide equivalent facilities, equipment and personnel in both black and white schools.

Brown effectively removed the legal underpinnings of *Plessy* v. *Ferguson*, ended the doctrine of "separate but equal," and laid the groundwork for a new equal protection clause jurisprudence.

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[4]Deeds, 18 C. J. §§ 462 (Anno), 463, 458, 558 (Anno); Injunction, 32 C. J. §§ 315, 319; Deeds, 18 C. J. § 558 (Anno); Evidence, 23 C. J. § 1701.

Sipes v. *Board of Regents of University of Oklahoma*, 332 U.S. 631: *Sweatt* v. *Painter*, 330 U.S. 629; *McLaurin* v. *Oklahoma State Regents*, 339 U.S. 637.

APPENDIX E

The Northwest Ordinance of 1787, which established the basic principles of government for the area which would become the State of Michigan, provided, "Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." Art. III. This provision became part of the Michigan Constitution of 1908, Art XI, Sec. 1, and is now part of the present State Constitution, Art. VIII, Sec. 1.

The idea that religion and morality were necessary to good government and the happiness of mankind was part of the basic faith of the age of the Founding Fathers. This faith was grounded in the natural law tradition, and this tradition in turn "depends ultimately on religion."[1]

The Declaration of Independence proclaims, "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." Thomas Jefferson, the author of the Declaration, firmly believed that the Rights of Man were given by God and were thus truly unalienable, not to be surrendered by individuals nor denied by merely human governments. He said, "the God who gave us life gave us liberty at the same time."

Reflecting upon the malignant effects of slavery on the minds of the people, Jefferson wrote, "[C]an the liberties of a nation be throught secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are the gift of God? That they are not to be violated by with His wrath?"[2]

Similarly, Alexander Hamilton, who was poles apart from Jefferson on so many matters, wrote, "The sacred rights of mankind are not to be rummaged for among old parchments

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[1] Wu, Foundation of Justice 127 (1955).

[2] "Notes on Virginia," quoted in Padover, id., Thomas Jefferson on Democracy 99 (1939).

records. They are written, as a sunbeam, in the whole volume of human nature, by the hand of Divinity Itself, and can never be erased or obscured by mortal power."[3]

Nor were these great leaders alone in their beliefs. To the Americans of the age of the Founding Fathers, the " 'the laws of nature and of nature's God' were no products of fancy, nor even mere ideals; they were absolutely *real*, infinitely more real than any human law."[4] In subscribing to the Declaration of Independence, Americans "meant exactly what they said. They were a generous, sincere, freedom-loving and God-fearing people. They saw these truths to clearly and felt so deeply about them that they were willing to stake their lives upon them."[5] Indeed, no one could ever take religion more seriously than the Puritans who helped found this nation.[6]

The basic faith of the Founding Fathers in the God-given equal and natural rights of man was reflected not only in the Declaration of Independence and the Northwest Ordinance, but also in the Constitution and the Bill of Rights. The Constitution was adopted "in order to . . . establish Justice, insure domestic Tranquility, . . . and secure the Blessings of Liberty. . . ." Preamble.

The Prophet Isaiah teaches us: For "the work of justice shall be peace." Is. 32, 17. If you want peace, pursue justice.

Since neither domestic tranquility nor liberty could be enjoyed without justice, the Founding Fathers added a Bill of Rights to further define individual freedoms and to limit and regulate the power of government. The First Amendment recognized that religion was a fundamental bulwark of the American order by providing that Congress could "make no law . . . prohibiting the free exercise" of religion. At the same time, the Founding Fathers acknowledged that America was a religiously

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[3] Quoted in Wu, supra, n. 1, at 129.

[4] Id. at 127.

[5] Id.

[6] Id.

pluralistic society, and they categorically prohibited Congress from passing any law "respecting an establishment of religion."

In addition to many specific limitations on government designed to secure justice to the American people, the Bill of Rights also provided more generally, in the Fifth Amendment, that "no person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

Unfortunately, the existence of slavery meant that some Americans could enjoy neither justice, nor domestic tranquility, nor the blessings of liberty. As Gunnar Myrdal pointed out in An American Dilemma, the only reason for slavery was the advantage, profit, and power of White people. [7] However, slavery was always counterproductive. Before the Declaration of Independence it divided and spread dissention among the colonies. After the creation of the new nation, slavery became one of the most troublesome and divisive issues. The first generations of Americans up to the Civil War were in intermittent and then constant turmoil over the existence and extension of slavery.

Over the long run, slavery did the most damage to the intellectual, moral, and religious aspects of American life. Slavery collided head-on with the "Laws of Nature and Nature's God," which underlay the whole political and social order. Under these circumstances, men were driven to invent rationalizations for the existence of slavery. Slave-holders believed that Blacks were naturally and inherently inferior to Whites, and that slavery was thus a reflection of the natural order of things.

These rationalizations, however, could not eliminate the fact that slavery was fundamentally immoral, an affront to the laws of God and the enlightened laws of Man. As Jefferson wrote with regard to the curse of slavery, "I tremble for my country when I reflect that God is just; that His justice cannot sleep forever."[8]

Whatever the immediate causes of the Civil War, it is apparent today that the ultimate cause was slavery. The most important

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[7] At xlvii (1944).

[8] "Notes on Virginia," quoted in Padover, ed., supra, n. 2 at 99.

result of the War was the abolition of slavery. However, the intention of the framers of the Thirteenth and Fourteenth Amendments was not merely to abolish slavery, but to eliminate all the legal *vestiges of slavery* which might be perpetuated by the action of the States.

Unfortunately, the rationalizations and attitudes which slavery has produced persisted as vestiges of slavery after the adoption of the Civil War Amendments. Many White people continued to believe that Blacks were inherently inferior. These attitudes gave rise to new forms of discriminatory practices by private individuals and public institutions alike, and these practices themselves took on the characteristics of the vestiges of slavery. These vestiges of slavery have proved as counterproductive as slavery itself.

When the delegates to the Michigan Constitutional Convention of 1961-62 met in Lansing, they faced the same hard questions as the Founding Fathers and the framers of the Bill of Rights and the Civil War Amendments. What kind of society do we really want? What principles should control?

The Michigan delegates returned to the first principles of the American constitutional order. As noted elsewhere, they adopted a broad equal protection clause. Mich. Const. of 1963, Art. I, Sec. 2. They re-adopted the basic principle of the Northwest Ordinance of 1787, that schools and the means of education should be encouraged, since religion, morality and knowledge were necessary to good governnment and the happiness of mankind. Art. VIII, Sec. 1.

The new Constitution also prohibited discrimination in education on the basis of religion, creed, race, color or national origin. Art. VIII, Sec. 2. In its official explanation to the people of Michigan, "What the Proposed New State Constitution Means to You" (1962), the Constitutional Convention emphasized, "This anti-discrimination clause is placed in this section as a declaration which leaves no doubt as to where Michigan stands on this question." [9]

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[9] At 77.

In the text of the Constitution and in their explanation, the delegates acknowledged that constitutional provisions, however technical in form, cannot realistically be separated from basic religious and moral principles. The delegates knew that constitutional provisions and great questions of constitutional law necessarily involved these religious and moral principles, and they thought the people of Michigan should make this explicit, especially in the crucial area of education.

Between 1967 and 1971, responsible citizens and school authorities in Kalamazoo moved to put an end to racial segregation in the public schools. The Report of the Citizens' Committee submitted to the Kalamazoo Board of Education in 1969, said,

> "[T]he committee feels a moral obligation to provide equal educational opportunity and quality education for all Kalamazoo school children. . . . .
>
> If our community wants to solve the problems that arise from racial strife and poverty, we must begin with our children, and at the earliest age possible. When children who are of one color meet children of another color for the first time at junior high school, it is too late. Attitudes have been hardened, fear has overcome reasoning, and explosion results." [10]

The Citizens' Committee cited legal in addition to moral reasons for integration of the Kalamazoo public schools. In considering both moral and legal aspects of the problem of segregation, the Committee returned to the faith and perceptions of the Founding Fathers, as reflected in the Northwest Ordinance and the current Michigan Constitution. It was certainly proper for the Committee to do this.

On the eve of the end of the Civil War in 1865, President Lincoln, in his Second Inaugural Address, attempted to set the spirit for the age to come:

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[10] At 5.

"With malice toward none; with charity for all; with firmness in the right, as God gives us to see the right, let us strive on to finish the work we are in; to bind up the nation's wounds; . . . –to do all which may achieve and cherish a just and lasting peace among ourselves, and with all nations."

This remains good adice. We should all move forward in a spirit of good will to eliminate the state-created and maintained vestiges of slavery in the Kalamazoo school system toward the end that we may truly become one nation under God with liberty and justice for all.

Filed October 18, 1973
Docket No. 301

K-88-71 C.A. – OLIVER v. KALAMAZOO BOARD OF EDUCATION, et al.

Mr. Richard Enslen
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Mr. George McCargar, Jr.
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Gentlemen:

The court is making a slight change in the Opinion and Order dated October 4, 1973, entered in the above action.

On page 24 of the Opinion and Order, after the first sentence of the second full paragraph (which reads, "The starting place is the standards and processes evolved by the common law for determining the relevant state of mind of the defendant, or defendants, in an intentional tort suit"), add the following:

"The Supreme Court and the Sixth Circuit Court of Appeals have said that one of the Congressional statutes relied upon by the plaintiffs in this case, 42 USC, Section 1983, 'should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.' Monroe v. Pape, 365 U.S. 167, 187, 5 L.Ed.2d 492, 81 S.Ct. 473 (1961); Pierson v. Ray, 386 U.S. 547, 556, 18 L.Ed.2d 288, 87 S.Ct. 1213 (1967);

Puckett v. Cox, 456 F.2d 233, 235 (6th Cir. 1972); see Fitzke v. Shappell, 468 F.2d 1072 (6th Cir. 1972).

Yours very truly,

/s/ NOEL P. FOX
Noel P. Fox
Chief District Judge

Filed November 2, 1973
Docket No. 302

UNITED STATES OF AMERICA
IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHELLE OLIVER, et al., ***Plaintiffs,*** **v.** **KALAMAZOO BOARD OF EDUCATION, et al.,** ***Defendants.***	**K-88-71 C.A.**

ORDER AND JUDGMENT FOR PERMANENT INJUNCTION

The above-entitled and numbered cause having come on for trial on the merits, the parties having been represented by counsel;

AND the court having heard the evidence, having received and reviewed Proposed Findings of Fact and Conclusions of Law and supporting briefs;

AND the court having filed its Opinion and Order on October 4, 1973, resolving the issues between the parties and requiring a separate Order in conformance with the October 4, 1973 Order and Opinion, pursuant to Rule 58 of the Federal Rules of Civil Procedure;

AND the court having found a pattern and practice of unconstitutional racial segregation resulting from purposeful actions and inactions of the defendants, including the Kalamazoo Board of Education;

IT IS ORDERED, ADJUDGED AND DECREED that the Preliminary Injunction heretofore granted and issued by this Court on the 25th day of August, 1971 (but not including the amendment to the Preliminary Injunction made, issued and granted on the 7th day of October, 1971), be and the same hereby is made permanent.

IT IS FURTHER ORDERED that the Kalamazoo Board of Education's May 7, 1971 plan of desegregation shall continue to

be implemented as it presently operates, without change or modification except on the Order of this Court. Since it appears from the record that the present junior high feeder pattern is administratively inconsistent and can be altered to eliminate this inconvenience in accordance with the basic concept of the May 7, 1971 plan, the court will hold a hearing to explore and consider this matter at a date and time to be set. Any party may move for amendment or alteration of the May 7 plan from time to time if there is a change in circumstances or for other good cause shown. The moving party shall have the burden of justifying the modification it proposes. The court does not regard these alterations, or the possibilities thereof, as affecting the finality of this Judgment for purposes of appeal.

IT IS FURTHER ORDERED that the defendant, Michigan State Board of Education, and the Superintendent of Public Instruction, Dr. John W. Porter, and his successors, are enjoined from taking any action which will in any manner recreate or perpetuate segregated, racially identifiable schools in Kalamazoo in contravention of the Kalamazoo Board's May 7, 1971 plan as approved by this court. These defendants are further enjoined to render such further assistance as may be helpful to the Kalamazoo Board of Education in the execution of the order of this Court, providing such assistance is within the constitutional and statutory duties and authorities of the State Board of Education and the Superintendent of Public Instruction, respectively.

IT IS FURTHER ORDERED that the Kalamazoo Board of Education shall apply to the Federal Government immediately and from time to time for such financial assistance as may be available to aid the Board in executing the present Order of this Court. The Kalamazoo Board of Education is also ordered to make application to the Legislature of the State of Michigan for financial assistance to aid the Board in executing the Order of this Court.

IT IS FURTHER ORDERED that the State Board of Education and the Superintendent of Public Instruction, Dr. John W. Porter, and his successors, are ordered to make, and help as necessary in the preparation of, applications to the Federal Government for such financial assistance as may be available to aid all parties in the execution of this Judgment. These defendants are further or-

dered to join with the Kalamazoo Board of Education in making application to the Legislature of the State of Michigan for financial assistance to aid in the execution of this Decree.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the defendants shall pay the costs of this proceedings. The Court reserves judgment on the question of whether these costs shall include attorney fees, and if so, how much shall be allowed, until all parties have been given the opportunity to file briefs and to be heard on the matter. The Court does not deem the pendency of this issue to affect the finality of this Judgment for the purposes of appeal.

IT IS FURTHER ORDERED that all other claims for relief asserted by plaintiffs in their complaint be and hereby are denied.

Dated: November 1, 1973.

/s/ NOEL P. FOX
Noel P. Fox
Chief District Judge

Nos. 74-1104 and 74-1105

United States Court of Appeals
For the Sixth Circuit

MICHELLE OLIVER, ET AL.,
Plaintiffs-Appellees,
v.
MICHIGAN STATE BOARD OF EDUCATION, ET AL.,
Defendants-Appellants,
and
KALAMAZOO BOARD OF EDUCATION, ET AL.,
Defendants-Appellants.

APPEALS from the United States District Court for the Western District of Michigan, Southern Division.

Decided and Filed December 9, 1974

Before: WEICK, CELEBREZZE, and PECK, Circuit Judges.

CELEBREZZE, J., delivered the opinion of the Court, in which PECK, J., joined. WEICK, J. (pp. 17-36), filed a dissenting opinion.

CELEBREZZE, Circuit Judge. These appeals present the merits of a school desegregation suit brought against the Kalamazoo Board of Education, its Members, and its Superintendent, and against the Michigan State Board of Education

and its Superintendent.[1] The District Court's Order grants permanent injunctive relief in the form of a desegregation plan adopted by the Kalamazoo Board of Education on May 7, 1971, but revoked on July 6, 1971. The injunction requires the State and local defendants to refrain from further segregative actions and inactions. The District Court assessed the costs of the proceedings against Appellants, but left the question of attorney fees for subsequent resolution.

The State and local defendants filed appeals, which have been consolidated in this proceeding. The issues are essentially three: whether the District Judge should have recused himself, whether the District Court's standard of liability was incorrect, and whether the District Court's findings were clearly erroneous.

Recusal

Appellants moved, pursuant to 28 U.S.C. § 144 (1968),[2] that the District Judge, Noel P. Fox, recuse himself because

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[1] Prior orders in this case have included the following: Temporary Restraining Order (Aug. 12, 1971); Preliminary Injunction, 346 F. Supp. 66 (W.D. Mich. 1971) (Aug. 24, 1971), *aff'd*, 448 F.2d 635 (6th Cir. 1971) (Aug. 30, 1971); Order Denying Motion to Recuse (Aug. 9, 1972); Order Denying Petition for Writ of Mandamus or Prohibition seeking Recusal of District Judge (6th Cir. Jan. 5, 1973); Opinion and Order of Permanent Injunction, 368 F.Supp. 143 (W.D. Mich. 1973) (Oct. 4, 1973).

[2] 28 U.S.C. § 144 provides:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall be assigned to hear such proceeding.
>
> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

of his personal bias or prejudice in the case. The affidavit which accompanied the recusal motion contained numerous allegations about the propriety of certain rulings of the District Judge. Finding that the allegations failed to establish the personal bias or prejudice required to sustain a recusal motion, the District Court denied the motion.

Appellants' affidavit included allegations that the District Judge held "an unshakable conviction" that there is no distinction between de facto and de jure segregation for constitutional purposes; that the relief granted was biased in favor of the black plaintiffs and prejudicial to poor whites; that personal bias for the plaintiffs was demonstrated by the manner in which the parties were characterized and the treatment accorded the parties, counsel, and witnesses; that an irrelevant and erroneous finding was made with regard to certain advice given by the defendants' attorney; that a Motion for Protective Order filed by plaintiffs was given improper treatment; and that there was undue delay in holding the trial on the merits of the case. All these allegations relate to, and are sought to be supported by, proceedings in and rulings by the District Court.

Treating the facts alleged in the affidavit as true and looking only to the sufficiency of those facts in considering the recusal motion, *Berger* v. *United States*, 255 U.S. 22 (1921), we find that the allegations do not suffice to support a claim of personal bias or prejudice on the part of the District Judge. As we have stated previously:

> The bias or prejudice which will disqualify a judge must be "personal" bias or prejudice as distinguished from a judicial one. . . .
>
> It is not sufficient if the alleged bias or prejudice arises out of the judge's background and associations rather than his appraisal of the complaining party personally. . . .

> Nor is it sufficient that the alleged bias or prejudice arises from the judge's view of the law, which may have been expressed by him in some prior case. . . .
>
> A judge is not disqualified merely because he believes in upholding the law, even though he says so with vehemence. . . .
>
> Adverse rulings during the course of the proceedings are not by themselves sufficient to establish bias and prejudice. *Knapp* v. *Kinsel*, 232 F.2d 458, 466 (6th Cir. 1956).

See United States v. *Amick*, 439 F.2d 351, 369 (7th Cir. 1971); *Plaquemines Parish School Board* v. *United States*, 415 F.2d 817, 824-25 (5th Cir. 1969); *Tynan* v. *United States*, 376 F.2d 761, 764-65 (D.C. Cir. 1967). We affirm the District Court's denial of the recusal motion.

Standard of Liability

Appellants challenge the standard of liability applied by the District Court, asserting that the District Court held them responsible for remedying de facto segregation and ignored the requirement that de jure segregation be shown as a predicate to a desegregation order.

We agree with Appellants that no remedy may be ordered when no constitutional violation has occurred. The federal courts are not free to intrude on the legitimate prerogatives of elected school officials. But the federal courts are guardians of constitutional rights and will protect minorities and majorities alike when they are deprived of the equal protection of the laws, despite an inevitable intrusion into decisions left to public officials in the absence of a constitutional violation. Given a constitutional violation, a remedy is not only proper but necessary. *Brown* v. *Board of Education*, 347 U.S. 483

(1954), 349 U.S. 294 (1955); *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971).

We need not confront the question whether de facto segregation in a public school district establishes a constitutional violation of the Equal Protection Clause.[3] The District Court explicitly adopted a test dependent on purposeful segregation by public school officials:

> For the purposes of this case, the court assumes that the plaintiffs must establish that the defendants are guilty of de jure segregation of the Kalamazoo public schools. . . .
>
> [T]he major legal elements and conditioning factors of the constitutional tort of de jure segregation [footnote omitted] are reasonably clear. Under the Keyes theorem, in addition to showing that segregated schools exist, plaintiffs should establish (1) that the state to a significant degree caused or maintained these segregated conditions, and (2) that the state intentionally, i.e., purposefully, created or maintained them. . . .
>
> Under Keyes, in an intentional case, to be guilty of a constitutional violation, the state and local authorities must have in fact caused or maintained the segregated conditions which are complained of. Under this theory, it is a complete defense that the state and local authorities have not at all caused or maintained these conditions. Similarly, the state will not be held legally responsible if it has only occasionally committed segregative acts and these acts are of trivial importance and bear no significant relation to the modern situation.

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[3] This is a question which the Supreme Court seems to have left open, *Keyes* v. *School District No. 1*, 413 U.S. 189, 212 (1973). At least one Circuit has abandoned the de facto-de jure distinction. *Cisneros* v. *Corpus Christi Independent School District*, 467 F.2d 142, 149 (5th Cir. 1972) (*en banc*), *cert. denied*, 413 U.S. 922, *reh. denied*, 414 U.S. 881 (1973).

> Rather, the standard must be that the state and local agencies to a substantial degree contributed to the creation or maintenance of segregated schooling in Kalamazoo. . . .
>
> Under Keyes, defendants must not only have caused the schools to be segregated, but must have intentionally caused them to be segregated.
>
> Of course, in order to make its ultimate determination on the issue of intention, the court must fully consider the evidence and arguments presented by all the parties, including the claim by the Kalamazoo school board that it was resolutely applying a racially neutral neighborhood school policy. . . .
>
> It is established that where an appropriate factual showing has been made, including a showing that an existing segregated situation is to a significant extent the natural, probable, and actual result of the actions and inactions of the state and local agencies, the plaintiffs have laid an evidentiary foundation for the conclusion that the results, segregated schools, were intended to be reached by these authorities. 368 F.Supp. 143, 157, 159, 161, 162.

We find this to be a correct formulation of the de jure test, flowing directly from our holdings in *Bradley* v. *Milliken*, 484 F.2d 215, 222, 241-42 (6th Cir. 1973) (*en banc*), *rev'd on other grounds*, 42 U.S.L.W. 5249 (July 25, 1974), and *Davis* v. *School District of Pontiac*, 443 F.2d 573 (6th Cir. 1971), *aff'g* 309 F.Supp. 734, 744 (E.D. Mich. 1970), *cert. denied*, 404 U.S. 913 (1971), *cited with approval in Keyes* v. *School District No. 1*, 413 U.S. 189, 210 (1973). *See also Brinkman* v. *Gilligan*, Nos. 73-1974-75 (6th Cir. Aug. 20, 1974); *United States* v. *Board of School Commissioners*, 474 F.2d 81 (7th Cir. 1973), *aff'g* 332 F.Supp. 655 (S.D. Ind. 1971), *cert. denied*, 413 U.S. 920 (1973). Although our conclusion regarding a cross-district remedy was reversed by the Supreme Court

in *Milliken* v. *Bradley*, the Supreme Court unanimously affirmed our determination that de jure segregation had been proven within the City of Detroit, on the basis of the same standard used by the District Court in this case.[4]

A finding of de jure segregation requires a showing of three elements: (1) action or inaction by public officials (2) with a segregative purpose (3) which actually results in increased or continued segregation in the public schools.[5] A presumption of segregative purpose arises when plaintiffs establish that the natural, probable, and foreseeable result of public officials' action or inaction was an increase or perpetuation of public school segregation. The presumption becomes proof unless defendants affirmatively establish that their action or inaction was a consistent and resolute application of racially neutral policies. *Keyes* v. *School District No. 1, supra; Bradley* v. *Milliken, supra; Davis* v. *School District of Pontiac, supra; Kelly* v. *Guinn*, 456 F.2d 99 (9th Cir. 1972), *cert. denied*, 413 U.S. 919 (1973); *Branche* v. *Board of Education*, 204 F. Supp. 150 (E.D. N.Y. 1962); *People* v. *San Diego Unified School District*, 19 Cal.App. 3d 252, 96 Cal. Rptr. 658 (Ct. App. 1971); *Johnson v. San Francisco Unified School District*, 339 F.Supp. 1315, 1318 (N.D. Cal. 1971), *app. for stay denied*, 404 U.S. 1215 (1971).[6]

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[4] See Opinions of Burger, C.J., 42 U.S.L.W. at 5256, n. 18; Stewart, J., concurring, 42 U.S.L.W. at 5260; White, J., dissenting, 42 U.S.L.W. at 5263; Marshall, J., dissenting, 42 U.S.L.W. at 5270.

[5] *See* Note, "*Keyes* v. *School District No. 1*: Unlocking the Northern Schoolhouse Door," 9 Harv. Civ. Rights—Civ. Lib. L. Rev. 124, 149 (1974).

[6] The regimen of presumption of intent established by objective facts and affirmative defense to rebut the inference of improper intent follows the practice in employment discrimination cases. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Long v. Ford Motor Co.*, 495 F.2d 500 (6th Cir. 1974).

Findings of Fact

We turn to Appellants' objections to the District Court's factual findings. Our function on review is limited to ascertaining whether the District Court's application of its legal standard to the facts before it was clearly erroneous. *Goss* v. *Board of Education of Knoxville*, 482 F.2d 1044, 1047 (6th Cir. 1973), *cert. denied*, 414 U.S. 1171 (1974); *Northcross* v. *Board of Education of Memphis*, 489 F.2d 15, 17 (6th Cir. 1973), *cert. denied*, 42 U.S.L.W. 3594 (April 22, 1974). Appellants challenge many individual findings of the District Court, but the theme of the local Appellants is that the Kalamazoo Board of Education has always followed a neighborhood school policy and has never intentionally furthered segregation, and the basic argument of the State Appellants is that there is no evidence at all that they contributed to segregation in the Kalamazoo public schools.

When constitutional rights are involved, the issue is seldom whether public officials have acted with evil motives or whether they have consciously plotted with bigotry in their hearts to deprive citizens of the equal protection of the laws. Rather, under the test for de jure segregation, the question is whether a purposeful pattern of segregation has manifested itself over time, despite the fact that individual official actions, considered alone, may not have been taken for segregative purposes and may not have been in themselves constitutionally invalid. *Davis* v. *School District of Pontiac*, 443 F.2d 573, 576 (6th Cir.), *cert. denied*, 404 U.S. 913 (1971). Benevolence of motive does not excuse segregative acts. As the Supreme Court stated in *Wright* v. *Council of City of Emporia*, 407 U.S. 451, 461 (1972), "The 'dominant purpose' test finds no precedent in our decisions. . . .The existence of a permissible purpose cannot sustain an action that has an impermissible effect."

The findings of the District Court are explicit, detailed and extensive, and need not be repeated herein. *See* 368 F.Supp. 143

(W.D. Mich. 1973). We shall consider the overall situation in the Kalamazoo schools and three specific areas of school policy in determining whether the District Court's conclusions are clearly erroneous.

By stipulation it is admitted that much of the Kalamazoo public school system is racially segregated. The District Court found that of 29 elementary schools, with a total Black student percentage enrollment of 16.1%, 92.3% of the Black elementary students attended 5 schools, no Black pupils attended 6, and 14 schools had fewer than five Black students. Of five junior high schools, with a total Black enrollment of 14.7%, the Black student population of two amounted to only 1.7% of each school's enrollment, while the Black enrollment at the other three amounted to 26.2%, 24.6%, and 13.9%, respectively. Of two senior high schools, the student body of one was 1.6% Black while the Black student enrollment at the other was 19.7% of the school's population. Thus, while some Kalamazoo schools reflect the racial mix in Kalamazoo generally, some schools are identifiably "White" and others are identifiably "Black."

Racial segregation in the Kalamazoo schools was found to be directly tied to educational inequality between the races. The District Court found, "Black students have fallen as many as four grades behind their White counterparts by the time they leave school. Furthermore, the Citizens' Committee on Integration . . . reported in 1969 that identifiably Black schools ranked at the bottom of the system in terms of academic achievement." 368 F.Supp. at 155. Upon a thorough review of the evidence, we cannot find fault with the conclusions that the Kalamazoo public schools are racially segregated and that students in identifiably Black schools suffer educationally and psychologically from the segregated conditions.

Appellants do not attack these conclusions as vigorously as they deny that they have intentionally furthered school segregation. We need not consider each particular attack on the District Court's findings to conclude that the finding of purposeful segregation by public action and inaction not only is not clearly erroneous but is fully supported by the record. This conclusion is apparent from a review of three areas of school policy.

First, the District Court found that the local Appellants had used attendance zone policies to further and perpetuate racial segregation. The District Court flatly rejected Appellants' argument that the Kalamazoo Board had administered a "neighborhood school policy" in a racially neutral fashion. "It is apparent that Kalamazoo elementary schools were not situated and boundaries were not drawn in a fashion which regularly placed students in the schools closest to their homes." 368 F.Supp. at 165. The Board made one elementary school more than twice as large as the smallest school, rather than disperse students attending the large school to schools closer to their homes. While attendance zones were often altered in overwhelmingly White areas of the city, the "rigidification of the boundaries of schools attended by the majority of Black students had the predictable and actual effect of cementing Black students into special areas and particular schools within those areas, and of preserving many other areas and schools for Whites." 368 F.Supp. at 166. Optional attendance zones were used to assure eventual racial segregation in areas of the city with changing residential patterns.

An example of purposeful segregation through attendance zone policies concerns Harding Elementary School, which was closed in 1960. Half of Harding's parent population which was 15.7% Black had their children reassigned to Edison School. The other half which was less thn 2% Black had their children reassigned to an optional attendance zone. The

Board then located a portable building at a nearby predominantly White school, despite available space at Edison, which had a substantial number of Black students. This combination of actions had the predictable and actual effect of eventually designating Edison as a "Black" school. As the District Court found, "The Kalamazoo Board was purposely confining Black elementary children in the south central portion of the city to Edison school." 368 F.Supp. at 167.

Such use of attendance zone policies provides the basis for a finding of dejure segregation. *Bradley* v. *Milliken*, 484 F.2d 215, 221-36 (6th Cir. 1973) (*en banc*), *rev'd on other grounds*, 42 U.S.L.W. 5249 (July 25, 1974); *Davis* v. *School District of Pontiac*, 443 F.2d 573, 576 (6th Cir. 1971), *cert. denied*, 404 U.S. 913 (1971); *United States* v. *Board of School Commissioners of Indianapolis*, 474 F.2d 81, 85-86 (7th Cir. 1973), *cert. denied*, 413 U.S. 920 (1973). We find that the attendance zoning policy of the Kalamazoo Board did not follow a racially neutral "neighborhood school policy" but encouraged and perpetuated segregation in the public schools.

Second, the Kalamazoo Board's policies on school construction and siting perpetuated and increased racial segregation, according to the District Court. Northglade elementary school, for example, was "racially identifiable" as a Black school when it opened in 1959. 368 F.Supp. at 170. Opening the school with its attendance boundaries, in combination with other actions and inactions of the Board, resulted in the "foreseeable and actual effect" of "contain[ing] the future growth of the Black elementary school student population on the north side in . . . three schools," which by 1969 had become 53.8%, 87.2%, and 95.6% Black. The District Court found a policy of encouraging all-White schools in the northwestern part of the city by construction and school attendance policies. 368 F.Supp. at 170-71. Furthermore, the Board's involvement in the Arcadia project, a new housing development, amounted to sub-

stantial assistance in creating a virtually all-White community and elementary school. 368 F.Supp. at 173-74. In so doing, the Board did not merely establish a school in an area which had become racially segregated through the operation of purely private forces, but actually involved itself in creating a segregated community and a segregated school. In addition, the Board added "permanent and portable classrooms to White schools in cases where there was a significant amount of space available in racially identifiably Black schools [with] the obviously foreseeable and actual effect of perpetuating the segregated conditions which prevailed" from 1961 to 1970 and beyond. 368 F. Supp. at 173.

In these and other instances, which we find supported by evidence in the record, the Board's school construction and siting policies furthered and solidified Kalamazoo public school segregation. As the District Court stated, its findings "at least parallel and probably exceed the District Court's finding of state responsibility for school segregation in Pontiac, Michigan 'that school location and attendance boundary line decisions, for the past fifteen years, more often than not tended to perpetuate segregation.' *Davis*, 443 F.2d at 576." 368 F.Supp. at 172. *See also Bradley*, 484 F.2d at 236-38.

A third substantial factor in the creation and perpetuation of a dual school system in Kalamazoo was faculty staffing policy, which the Supreme Court has cited as "among the most important indicia of a segregated system." *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 18 (1971).[7] The District Court found "that the deliberate as-

[7] "[W]here it is possible to identify a 'white school' or a 'Negro school' simply by reference to the racial composition of teachers and staff . . ., a *prima facie* case of violation of substantive constitutional rights under the Equal Protection Clause is shown." *Swann*, 402 U.S.-at 18. *See also Green* v. *County School Board*, 391 U.S. 430, 435 (1968).

signment of teachers on a racial basis exacerbated the detrimental effects of state-imposed segregation, and was itself a significant segregative act." 368 F.Supp. at 178. Of the Black elementary staff in the Kalamazoo public schools in 1970, 80% were concentrated in the four elementary schools which contained 80% of the Black elementary pupils (out of 29 elementary schools in the system). Similar patterns existed for junior high and high school levels, albeit at less dramatic intensity. The Board seems to admit the disproportionate assignment of Black staff to "Black" schools, but argues that the rationale for such assignment by race was educational—to provide Black students with suitable role models and to decrease the tensions between teacher and pupil in the classroom.

The propriety of assigning Black staff to primarily Black schools, in the absence of a dual school system, is not in question here, except as it relates to the question whether a dual school system existed because of official actions contributing to the creation and perpetuation of a segregated school system. The inevitable result of assigning 80% of the system's Black elementary staff to schools with predominantly Black student bodies was to increase the identifiability of those schools as "Black." Whatever the wisdom and legality of placing more Black staff in schools with greater Black student populations, considered by itself, the disproportionate staff assignment by race clearly supports the District Court's conclusion that school board policies and actions served to create and strengthen the racial identifiability of certain schools as "Black" and thereby to further and perpetuate a dual school system in Kalamazoo. *See Swann*, 406 U.S. at 18; *Kelly* v. *Guinn*, 456 F.2d 99, 107 (9th Cir. 1972); *Davis* v. *School District of Pontiac*, 433 F.2d 573, 576 (6th Cir. 1971).

The District Court cited other factors of relevance to its overall finding, including the provision of inferior buildings

to schools with a large Black population,[8] the conscious neglect of many opportunities for decreasing racial segregation in the system,[9] and the "paucity of Black administrators and teachers" in the system.[10]

Finally, the District Court cited the action which immediately precipitated this suit as the "most concrete uncontrovertible predicate for the grant of equitable relief which Plaintiffs seek"—the July 6, 1971 resolution which revoked the May 7, 1971 plan which the Board had adopted to desegregate the school system. This revocation,[11] in light of the prior cumulative constitutional violation by the school authorities, is further evidence of the Board's racially segregative purpose. As the District Court stated, "This action literally transformed an integrated system (albeit a very new one) into a racially segregated system." 368 F.Supp. at 199.

We need not consider the revocation of the May 7 desegregation plan on its own to conclude that it supports the District Court's overall conclusion that the Kalamazoo public schools are de jure racially segregated. *See Keyes* v. *School District No. 1*, 413 U.S. 189 (1973); *Brinkman* v. *Gilligan*, Nos. 73-1974-75 (6th Cir. Aug. 20, 1974).

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[8] One School Board member testified that "The results [of the School Board's boundary and construction policies] were that the old schools were left to the Blacks."

[9] *See* 368 F.Supp. at 178-80.

[10] *See* 368 F.Supp. at 180.

[11] Though the Board argues that the May 7 plan was merely "postponed," it argues on appeal that the plan was hastily conceived and it has not presented to the District Court any alternatives which could desegregate the schools as well as the May 7 plan. The District Court found that the plan had been "carefully conceived and thoughtfully adopted." 368 F.Supp. at 194. Furthermore, the District Court found that the July 6 rescission "was intended to be and did serve as an outright revocation of not only the specific May 7 plan but also the broader underlying policy of school desegregation at the elementary and junior high levels in Kalamazoo." 368 F.Supp. at 196. We find no error in these conclusions.

We affirm the District Court's finding that the Kalamazoo Board of Education, its members and its superintendent have substantially contributed to the segregated conditions that make the Kalamazoo schools a dual system, effectively classifying students on the basis of race and denying Black children the equal protection of the laws.

A final consideration is the liability of the State Appellants for the de jure segregation of the Kalamazoo schools. The District Court found:

> In sum, the Superintendent had general supervisory authority over public education in Michigan between 1954, the date of the Brown decision, and the adoption of the new Constitution. The State Board of Education and the Superintendent as its chief executive officer have shared this constitutional power between 1963 and the present. During this entire period, the Superintendent and the Board were aware of racial segregation in Michigan public schools through complaints to this effect and then through their own statistical data. Still, the Superintendent and the State Board have persistently failed to act in a meangful way to ameliorate the situation.
>
> These facts compel the conclusion that the State of Michigan, through the State defendants in this case, has intentionally sanctioned the segregation of schools by local boards, and has made a substantial contribution to the creation and maintenance of segregated public schools in Kalamazoo and elsewhere. While the court notes that the Michigan Attorney General issued an opinion in 1970 that the State Board did not have the jurisdiction to hear appeals and review decisions of boards of education on attendance zones, the court finds that too many genuine opportunities for action have existed since Brown in 1954 for the segregation evidenced by the census statistics to be

fully excused by pleas of racial neutrality and merely adventitious segregation.

The State Board's persistent failure to implement the Joint Policy Statement of 1966 has been effective notice to local school districts throughout Michigan of a policy of non-supervision in the area of desegregation. These school boards were able to conclude that they could take actions for perpetuating Black schools without the interposition of the State Board and the State Superintendent. This non-action exacerbated the segregated conditions in many school systems in the State of Michigan, diminished the likelihood of voluntary desegregation, and permitted or perhaps encouraged the kind of counterproductive action exhibited in Kalamazoo on July 6, 1971. 368 F.Supp. at 190.

Upon a thorough review of the briefs and record, we find the District Court's conclusion as to the State Appellants to be supported by substantial evidence in the record.

The substantial control of Michigan state officials over local schools operations has been stated previously by this Court and need not be repeated herein. *See Bradley* v. *Milliken*, 484 F.2d 215, 238-41 (6th Cir. 1973) (*en banc*), *rev'd on other grounds*, 42 U.S.L.W. 5249 (July 25, 1974). Given de jure segregation in the Kalamazoo schools, substantially contributed to by local school officials, the State Board of Education and Superintendent may properly be held jointly responsible for segregated conditions in the Kalamazoo schools, in view of their consistent inaction in preventing increased segregation or remedying existing segregation in the Kalamazoo schools and their consistent funding of school construction projects, support for operating fund requests, and other assistance provided to Kalamazoo officials. The failure to take the many available measures against Kalamazoo officials for their segregtive actions renders the State Board and Superintendent responsible for de

jure segregation in the Kalamazoo schools and subjects them to the reasonable commands of the District Court's desegregation order. *See United States* v. *Texas Education Agency*, 321 F.Supp. 1043 (E.D. Tex. 1970), 330 F.Supp. 235, *aff'd with mod.*, 447 F.2d 441 (5th Cir.), *stay denied*, 404 U.S. 1206 (Black, J.), *cert. denied*, 404 U.S. 1016 (1971).

Finding no reversible error in the proceedings below or in the order issued therefrom, we affirm the decision of the District Court.

WEICK, Circuit Judge, dissenting. The plaintiffs in their brief state, "This is a classic school desegregation case." The state appellants term it "unique." What happened is unprecedented in school desegregation litigation. The District Judge, by means of a temporary, and then a preliminary mandatory injunction (granted only eight days after the filing of the complaint), adopted and put into full force and effect a Racial Balance Plan for the public school system in Kalamazoo, Michigan.[1]

Thus, by means of the preliminary mandatory injunction, the plaintiffs obtained, without trial on the merits, all the re-

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[1] The Racial Balance Plan had been previously adopted at a meeting of the Kalamazoo Board of Education, held on May 7, 1971, in a resolution passed by a 4 to 3 vote. The plan was never implemented by the Board. The terms of office of two of the four Board members who voted in favor of the resolution were expiring at the end of the month and an election was imminent, to be held in June. At the June election two new members of the board were elected.

On July 6, 1971, at the first meeting of the new Board following the election, the Board by a 5 to 2 vote adopted a resolution which in effect rescinded the May 7th plan by postponing implementation of it for one year pending further study. The resolution called upon the school administration to submit alternate plans to improve racial and socio-economic balance. The resolution "provided in the interim for a voluntary transfer and transportation plan permitting students to transfer from neighborhood schools [to other schools] where better racial and socio-economic balance was attained."

Thus, at the time of the filing of the present suit no plan was either adopted or was in effect.

It seems to be more than a mere coincidence that substantially the same phenomena of a plan of desegregation adopted by the votes of Board members whose terms of office were about to expire, (and which plan was rescinded by the new Board) recently occurred in Dayton, Ohio (see *Brinkman v. Gilligan*, — F.2d — (6th Cir. Nos. 73-1974, 73-1975, decided Aug. 20, 1974), and also in Cincinnati, Ohio.

The important questions in school desegregation cases ought not to be resolved by hasty and precipitous action taken on the eve of an election which could result in a change in the composition of the Board. The public is entitled to better treatment than that.

In the present case the plaintiffs sought to invalidate the Board resolution of July 6th, and to reinstate the resolution of May 7th. This relief was obtained in only eight days.

lief which they were seeking. Of course, it was not final, but the Board was required to comply immediately with the injunction which involved substantial changes in operation, including the forced busing of school children away from their neighborhood schools to achieve a balancing of the races. Appellants contend that more busing is required than was necessary even to achieve a racial balance.

The law of *Brown* v. *Board of Educ. of Topeka*, 347 U.S. 483 (1954), had been in effect for seventeen years before plaintiffs filed this action to vindicate their constitutional rights.

It would appear that the District Judge proceeded with great haste in hearing and granting the motion for a preliminary mandatory injunction, and proceeded with inordinate delay thereafter, as it took him more than two years before he finally heard and decided the case on its merits, without making any substantial change in the preliminary order.[2]

A preliminary mandatory injunction is seldom granted before final hearing on the merits, and should be granted only in extreme or exceptional cases. 42 Am. Jur.2d § 21, p. 753. The very purpose of either a temporary or a permanent injunction is to preserve the status of a case until final hearing. 42 Am. Jur.2d § 13, p. 740. The status here was that no plan for racial balance or desegregation was adopted nor was one in effect at

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[2] This Court affirmed by per curiam in *Oliver v. School Dist.*, 448 F.2d 635 (6th Cir. 1971), holding that the District Judge did not abuse his discretion, but stating that it "expressly refrains from approving all of the language and holdings of the District Judge in his opinion rendered August 24, 1971."

The Court took into account the fact that the District Court "has scheduled an early hearing on the merits of the case," at which time the Court could make modifications in the plan. The "early hearing on the merits" never took place.

The trial did not commence until February 28, 1973, and with recesses ended on May 21, 1973. The Judge filed his opinion and order on October 4, 1973 and a modification on October 18th, and issued a permanent injunction on November 2, 1973. The case had been pending since August 12, 1971.

the time the present action was filed. The District Court should not have put into effect any desegregation plan without a full hearing on the merits of the case.

It is not understandable why there was such a great rush to proceed with the hearing on the motion for a preliminary mandatory injunction. The case had just been filed. No black student had been excluded from a Michigan public school since 1869, which was more than one hundred years before *Brown* v. *Board of Educ., supra,* was decided by the Supreme Court. *Workman* v. *Board of Educ.*, 18 Mich. 39. See also *Milliken* v. *Bradley*, — U.S. — (42 U.S.L.W. 5249, July 25, 1974) for history of Michigan schools. By 1945 black families lived in nearly all parts of the city of Kalamazoo, although there were greater concentrations in certain areas of the city. In that year black children attended every one of the fourteen schools in the system.

Black migration to Kalamazoo increased between the years 1940 and 1970 from 1,117 (2.06% of the population) to 7,974 (16.1%), all living within the 1940 boundaries. In 1970, 2,800 black children, or 16.2% out of a total enrollment of 17,285, attended the schools in Kalamazoo. They constituted 17.6% of the elementary school enrollment, 14.9% of the junior high enrollment, and 13.8% of the senior high school enrollment. Only three elementary schools in the entire system had a majority black enrollment.

In 1970 black children were enrolled in 33 of the 29 school buildings operated by the Board. From 1945 to 1970 only three elementary schools did not have a black student enrolled. During the period of migration the black families moved into areas of concentration already governed by pre-existing attendance zone lines. There was no proof of gerrymandering of the previously-established lines.

It is obvious that the issues of this important case should not have been summarily resolved in eight days, as shown by the fact that the trial on the merits, which did not commence until a year and one-half later, consumed six weeks, with some two thousand exhibits, discovery depositions, and stipulations, most of which are contained in sixteen volumes of appendices filed in this Court. The Judge's opinion on the merits is over one hundred pages in length. In that opinion he adopted a multitude of findings of fact on contested issues.

On August 2, 1972 the Board filed an affidavit of bias under the provisions of 28 U.S.C. § 144, charging that the District Judge has a personal bias and prejudice against the board and in favor of the plaintiffs and the class which they represent. The affidavit was supported by a certificate of good faith signed by counsel. In general, it charged the Judge with prejudging the major issues in the case, with difference in attitude and treatment of counsel and witnesses with each party's cause; with unjustly and improperly accusing counsel for the Board of unethical conduct in their representation of the Board; and with entering a protective order preventing counsel for the Board from deposing a former Board member and a present Board member; and with unduly delaying proceedings and the trial. The facts are related in sixty-three pages of the appendix. The District Judge held that the affidavit was insufficient, and he declined to recuse himself.

In considering the affidavit of bias and prejudice the facts as stated therein must be accepted as being true. The Judge has no right to resolve any statement of fact with which he may not agree. The fundamental principle is that all litigants are entitled to a fair trial before a fair and impartial Judge. In *Knapp* v. *Kinsey*, 232 F.2d 458, 465 (6th Cir. 1956), we reversed the judgment because of bias and prejudice on the

part of the trial judge and a prejudgment by him of important issues before trial.

Here, the affidavit states that the Board, on August 21, 1972, filed a motion to dissolve the preliminary injunction. On December 21, 1972 the Judge by order deferred consideration of the motion to dissolve until final judgment. No mention of the motion to dissolve was made either in the Court's final opinion announced on October 4, 1973, or in its final judgment or order entered on November 2, 1973.

In his opinion granting the preliminary mandatory injunction the District Judge, in referring to the May 7th plan stated:

> This court finds, as a matter of fact and law, that it [the May 7 plan] was not precipitous: that it was a very careful, deliberate, fully-considered plan by conscientious, sincere, publicly dedicated, self-sacrificing men who had the courage to "bite the bullet." (Ia34)

The reference to the men having the courage to "bite the bullet" was a gratuitous statement upon which no evidence had been taken. The character qualities of the board members were not an issue in the case. The statement was particularly inappropriate because the Judge made no mention of the character qualities of the Board members who opposed the May 7th resolution, and it could be inferred that the Judge was not willing to attribute to them the same qualities. He did, however, pay his respects to the new membership of the Board, stating that they were "reflecting outspoken community hostility to the integration plan" in adopting the July 6th resolution. It is obvious that the Judge thought that the new Board members did not possess the same good character qualities such as the old Board members possessed, who voted in favor of the May 7th plan.

The affidavit further states that the District Judge in his opinion on plaintiffs' motion for preliminary injunction stated that the Board's attorney, Arthur Staton, Jr., a member of the Ford law firm, had given incorrect legal advice to the Board in response to its question whether it would be proper to seek guarantees from a builder of a housing project that it would not enhance or add to racial segregation. The affidavit states that the school Board never requested such advice from its attorney; and that he never gave any such opinion.

The opinion which the attorney gave to the Board was in response to a request made by the Michigan Civil Rights Commission to the Board for a firm guarantee that the Board develop and implement a plan for pupil assignment which would prevent any further racial imbalance in the schools regardless of the racial composition of the tenant population in the housing development planned for the city at Woodward Avenue and Paterson.

In response to the Board's request for an opinion on this subject, the attorney advised the Board:

> It is my opinion that the Board of Education is not legally required to give the guarantee requested by the Commission.

It is obvious that the Court's criticism of the attorney for giving incorrect legal advice to the Board, was unjustified.

The conduct of the Judge most bitterly complained of in the affidavit of bias and prejudice, was his charge of unethical conduct on the part of the Board's attorneys who had represented the Board for twenty years, including the time when the May 7th and the July 6th resolutions were passed. The facts are detailed on thirty-three pages of the appendix, Ia159-192.

The matter arose when counsel for the Board gave notice to take discovery depositions of Board member Edward P. Thompson and former Board member Dr. Andrew C. Luff. Mr. Thompson had been a Board member since 1965 and a two-term president of the Board. Dr. Luff had been a Board member from 1968 to July 1, 1972, and was a past vice president and treasurer of the Board.

Both of these gentlemen supported the May 7th resolution and Thompson opposed the July 6th resolution. Thompson, in a statement to the news media, stated that it reflected "decades of compulsory segregation in this city." Luff had testified as a witness for the plaintiff in the hearing on the motion for a preliminary injunction.

The plaintiffs filed a motion for a protective order to prevent the taking of the deposition or to limit it to matters of public record, and to direct but not cross-examination.

The affidavit of bias states that at the first hearing on the motion after plaintiffs' counsel had concluded his statement, and without giving the Board's counsel even an opportunity to respond, the Judge proceeded to decide the motion.

A portion of the colloquy which took place between the Judge and the Board's counsel, is as follows:

> THE COURT: This is what kind of bothers me, how your firm can continue to represent the school board when the school board drafted and participated in the activities for preparing the plan that is now in question, and now you are representing the school board that is questioning the plan that was worked out when your firm was their lawyer.
>
> MR. STATON: Well, why can't we do that? Isn't a lawyer entitled to represent this board? We represented this board as changes have taken place down through the

years. I know of no reason why that would forclose this law firm from the representation of this client in whatever kind of cause they need representation.

THE COURT: Well, I presume that as a lawyer or the lawyers of your firm participated in drafting the plan that is now a part of the school board system, that you advised them on this plan. (Ia163-164)

. . . .

THE COURT: I can't conceive how you can be in this position.

MR. STATON: What position is that, your Honor?

THE COURT: Well, you are representing two sides of the same question, and it is involving the same board.

. . . .

MR. STATON: The two that we propose to depose are presently members of the Board of Education.

. . . .

MR. STATON: Well, we have the right to depose even if they were my clients. I have a right to depose them under the rules of discovery, and the rules are clear on that, and I can produce the authority on that.

THE COURT: But you can't cross-examine. And I should probably preside at the deposition. (Ia167)

THE COURT: And your only client can operate through its members only, and that constitutes the Board. The Board doesn't exist in a vacuum. It exists with Board members, and that is the entity of your client.

. . . .

THE COURT: Well, it is raised from this standpoint: How can you then challenge these people who you represented as the Board? They were the Board at that time. And this goes to the proposition of how far you can go with discovery, how far you can treat these persons as adverse. What you are trying to do is treat these parties as adverse.

MR. STATON: I am trying to treat them as witnesses, and if their position is hostile, I am asking no more than something the rules give to every lawyer, and that is the right to use such every technique that is necessary to determine the facts and the truth. The paramount issue in this lawsuit is the truth. The parties are certainly entitled to have this determined on the truth, and I don't think the annoyance of the witness—

THE COURT: I am not talking about the annoyance of witnesses. I am talking about a lawyer representing a client and having represented a client and advised the client on the very subject itself that is in issue in the case, the plan itself.

. . . .

THE COURT: Well, what you are doing, you are deposing your own clients, and you are discovering your own clients' previous action, which you participated in as a law firm. (Ia168-169)

. . . .

THE COURT: Dual representation on the same issue. You advised these other people—at the time your law firm advised these other people during the preparation of the plan. Now, your law firm is representing a group that wants to tear the plan apart.

. . . .

THE COURT: I am ruling that you search the law and show me your authority to do this in light of the position of your law firm, in the posture of the case, that is precisely what I am asking you to do.

MR. STATON: Well, now it is their motion, and I would think, in accordance with ordinary propriety—

THE COURT: I am asking you from this standpoint; You are seeking to have this man—these people discovered. Now, in the posture of your law firm as having advised the previous Board, now seeking to discover

> your own presently composed board members, you are examining your own clients. (Ia170-171)

All essential material relating to this subject was submitted to the Michigan State Bar Committee on Professional Ethics, and it rendered an informal opinion finding no ethical limitation on the right of the Ford law firm to take the depositions of Dr. Luff and Mr. Thompson, and to continue to represent the Board of Education. A copy of that opinion is attached to the affidavit of bias.

But all of this did not end the inquiry. The Judge held another hearing. The affidavit states that counsel for plaintiffs made their argument to the Judge, with but a single interruption from him, and then only to reassure counsel.

The Judge continued to insist that the Board's counsel represented also the individual members of the Board; that it was a "delicate" situation for the Board; and that there was a "considerable conflict of position." (Ia177).

At the conclusion of the hearing the Court ruled orally from the bench that the motion for a protective order was well founded, and he prohibited the Board's attorneys from taking the discovery depositions. In his oral opinion the Court stated:

> Counsel for the Board has urged that they have never represented the individuals, and they continue to urge that they do not represent the individuals; just the entity of the Board.
>
> While this may be mechanically true and a mechanical interpretation of the law, the fact remains that the Board of Education cannot and does not exist in a vacuum. It can only exist through its living human being members acting in their official capacities, and in no other way. It just doesn't exist in thin air.

> An attorney representing a school board should owe a duty of confidentiality to persons who are the only available conduit of information between the client corporate body entity and the attorney.
>
> The long recognized fundamental principle of confidential attorney-client communications and relations can have no meaning absent recognition of the role of human interaction. The concept of an insensible artificial entity as the sole client, while useful and appropriate for many purposes, dehumanizes the attorney-client relationship and emasculates the attorney and client privilege if applied in this area blindly without flexibility. (Ia181)

On January 19, 1973 the Court amended its protective order to permit the Board to take the depositions with counsel of its choice. The order, however, had a condition that the deposition could be taken only when the Court was available, and the Judge stated that the Court would not be available until one week before trial. The Board then retained other counsel to take the depositions.

The Court's refusal to permit counsel of choice to appear either in a civil or in a criminal proceeding constitutes a denial of due process. *Powell* v. *Alabama*, 287 U.S. 45 (1932); *Roberts* v. *Anderson*, 66 F.2d 874 (10th Cir. 1933).

The affidavit charged further that it was the Judge who first initiated into the case the ethical question on the basis of presumptions which he made concerning the nature of the attorney-client relationship prior to the present litigation, which presumptions were without basis in fact and were derived from a personal bias and prejudice.

The affidavit further charged:

> *Three*—That your affiant states on information and belief the Honorable Noel P. Fox knew the mere raising of

> the Ethical question would stigmatize the Ford firm with unprofessional conduct before an entire community, and in litigation of great consequence and notoriety; that he knew such charge would deprive the Kalamazoo Board of Education not only of its choice of counsel but of counsel, because of background and experience, best able to represent it, with consequent additional delay and expense; that he knew such charge would require for refutation delay in the progress of the case until the ethical question had been of necessity resolved and its resolution would require the Kalamazoo Board of Education to disclose for all purposes of the litigation all attorney-client privileged information it had in connection with any matter related to the May 7th plan, its development and preparation, its passage, and the course planned by the Ford firm in the present litigation. It is the affiant's belief the Honorable Noel P. Fox could not, based solely on the aforesaid presumptions now clearly established as false, place the Kalamazoo Board of Education and its attorneys in such a position without such deep personal bias and prejudice against them as to render fair trial for them under him an impossibility. (Ia185-186)

The affidavit further charged that it was the plaintiffs who were seeking the protective order, not for their own protection, but to benefit material and crucial witnesses whom the defendant had the right to depose; and that the only benefit which plaintiffs could obtain from the protective order was concealment of the truth.

The applicable Canon of Professional Ethics is EC 5-18, which provides as follows:

> EC 5-18 A lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a stockholder, director, officer, employee, representa-

> tive, or other person connected with the entity. In advising the entity, a lawyer should keep paramount its interests and his professional judgment should not be influenced by the personal desires of any person or organization. Occasionally a lawyer for an entity is requested by a stockholder, director, officer, employee, representative or other person connected with the entity to represent him in an individual capacity; in such case the lawyer may serve the individual only if the lawyer is convinced that differing interests are not present.

Kalamazoo School District is an autonomous political body corporate, operating through a Board of Education popularly elected. M.S.A. § 15.3352; *Milliken* v. *Bradley*, — U.S. — (42 U.S.L.W. 5249, July 25, 1974) fn. 20. It is a "similar entity" to a private corporation within the meaning of Canon EC 5-18, above set forth. The body corporate is a separate entity from the individual members who comprise the Board of Education.

According to Canon 5-18 the Ford law firm owed its allegiance only to the entity and not to the individual members of the Board of Education, whom they did not represent. The District Judge was continually advised that the Ford firm did not represent the individual members of the board, but the Judge did not accept that advice. There is not one iota of proof that the Ford firm represented the individual Board members: yet the District Judge kept insisting that they did represent them, that there was a conflict of interest, and that the law firm was unethical. In disqualifying the law firm from taking the depositions of Messrs. Luff and Thompson he did so, not on the basis of harassment, but solely on the basis of conflict of interest.

A lawyer's good reputation in a community is his stock in trade. To be accused of unethical conduct by a federal judge, in a highly publicized, emotionally-charged lawsuit, was cer-

tainly damaging to the reputation of the firm's lawyers in the community where they practiced law, and also with their client, the Board of Education, which they had represented for twenty years. The client could very well question whether it had effective representation before a Judge who entertained such views as to its lawyers. The question of ethics was not raised by the attorneys for plaintiffs, but was injected into the case by the Judge.

The affidavit states that the Judge indulged in a presumption that the Ford firm represented the individual members. In the colloquy the Judge stated more than once that the Board does not exist in a vacuum. The same situation would exist with respect to attorneys for a private corporation; it does not exist in a vacuum, and yet we know of no authority holding that the attorneys for a corporation represent also its officers and directors and owe them a duty of fidelity.

The Judge seemed to be bothered by the fact that the Ford law firm represented the Board at the time of the adoption of the May 7th plan and defended the Board in a state court action involving that plan. But that plan was adopted by the Board and not by the attorneys. In their twenty years of representation of the Board they no doubt witnessed many changes in the personnel of the Board.

Furthermore, it is not unusual for an attorney to defend a client who has inconsistent claims for defenses. The pleading of inconsistent claims and defenses is expressly authorized by Rule 8(e)(2) of Fed.R.Civ.P. *City of Kingsport, Tenn.* v. *Steel and Roof Structure, Inc.*, — F.2d — (6th Cir. No. 74-1056, decided August 5, 1974).

The motion for a protective order was really much ado about nothing.

Who were the plaintiffs seeking to protect, and from what? The fact is that they were seeking to protect two of their own witnesses who were elected public officials and who were parties defendant in the case. These officials had supported the May 7th resolution adopting the "Racial Balance Plan", and they opposed the July 6th resolution; they were important witnesses and their testimony was crucial.

The Board had the right to depose these witnesses in discovery depositions. This right was never disputed, not even by the Judge.

All that the protective order accomplished was to prevent the Board's general counsel (who was familiar with all the facts, and was very familiar with the conduct of these two witnesses) from deposing them. The protective order thus thwarted the Board in its efforts to discover the truth prior to the trial. It impinged on the Board's constitutional right to be represented in the case by counsel of its choice.

In his opinion denying the motion to recuse, the District Judge stated:

> It is only if a judge draws upon nonjudicial sources to formulate a personal bias for or against any litigant which will affect his resolution of the merits of the issues before him that disqualifying prejudice is established.

In our opinion a Judge should not formulate a personal bias against a litigant from any source.

In *Berger* v. *United States*, 255 U.S. 22 (1921), the Court said:

> We are of opinion, therefore, that an affidavit upon information and belief satisfies the section and that upon its filing, if it show the objectionable inclination or disposition of the judge, which we have said is an essential condition, it is his duty to "proceed no further" in the case. (*Id.* at 35)

The Court further said:

> At any rate we can only deal with the act as it is expressed and enforce it according to its expressions. Nor is it our function to approve or disapprove it; but we may say that its solicitude is that the tribunals of the country shall not only be impartial in the controversies submitted to them but shall give assurance that they are impartial, free, to use the words of the section, from any "bias or prejudice" that might disturb the normal course of impartial judgment. And to accomplish this end the section withdraws from the presiding judge a decision upon the truth of the matters alleged. Its explicit declaration is that, upon the making and filing of the affidavit, the judge against whom it is directed "shall proceed no further therein, but another judge shall be designated in the manner prescribed in the section last preceding, or chosen in the manner prescribed in section twenty-three, to hear such matter." And the reason is easy to divine. To commit to the judge a decision upon the truth of the facts gives chance for the evil against which the section is directed. The remedy by appeal is inadequate. It comes after the trial and, if prejudice exist, it has worked its evil and a judgment of it in a reviewing tribunal is precarious. It goes there fortified by presumptions, and nothing can be more elusive of estimate or decision than a disposition of a mind in which there is a personal ingredient. (*Id.* at 35-36)

In *Connelly* v. *United States*, 191 F.2d 692 at 697 (9th Cir. 1951), the Court stated:

> It is not enough that the judge, despite his predetermination of the essential facts, may put them aside and conduct a fair trial, but that there also shall be such an atmosphere about the proceeding that the public will have the "assurance" of fairness and impartiality.

The atmosphere about the proceeding, if the affidavit is true, gave no assurance of fairness and impartiality to the public.

In discussing the fundamental rights of a defendant to a fair trial before a fair tribunal, we stated in *Knapp* v. *Kinsey*, 232 F.2d 458, at 465 (6th Cir. 1956):

> One of the fundamental rights of a litigant under our judicial system is that he is entitled to a fair trial in a fair tribunal, and that fairness requires an absence of actual bias or prejudice in the trial of the case. In re Murchison, 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942; Talbert v. Muskegon Construction Co., 305 Mich. 345, 348, 9 N.W.2d 572. If this basic principle is violated, the judgment must be reversed. In re Murchison, supra; Berger v. United States, 255 U.S. 22, 41 S.Ct. 230; 65 L.Ed. 481; Moskun v. United States, 6 Cir., 143 F.2d 129, 130; N. L. R. B. v. Phelps, 5 Cir., 136 F.2d 562.
>
> Bias or prejudice on the part of a judge may exhibit itself prior to the trial by acts or statements on his part. Or it may appear during the trial by reason of the actions of the judge in the conduct of the trial. If it is known to exist before the trial it furnishes the basis for disqualification of the judge to conduct the trial. Section 144, Title 28, U. S. Code.
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> . . . .
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> This statutory provision is not directly applicable to proceedings wherein the claimed bias or prejudice appears during the course of the trial. However, there would seem to be close analogy between bias and prejudice which would disqualify a judge from sitting in a judicial proceeding and the bias or prejudice appearing during the course of the proceedings which would render the judgment therein invalid.

See also *Offutt* v. *United States*, 348 U.S. 11 (1954); and *Cooke* v. *United States*, 267 U.S. 517 (1925).

The importance of according to the Board its fundamental rights is made all the more clear by the fact that the District Judge adopted a multitude of contested findings of fact.

The majority has accorded to these many findings of fact all of the presumptions of regularity and has found them not to be clearly erroneous. But, if the Judge who made them was biased, as the affidavit of bias clearly states, then the Board has not been accorded its constitutional right to a fair trial. *Berger* v. *United States, supra,* at 35, 36.

This Court has followed these salutary rules in the following cases: *United States* v. *Combs,* 390 F.2d 426 (6th Cir. 1968); *United States v. Bradt,* 294 F.2d 879 (6th Cir. 1961).

The facts set forth in the affidavit of bias required the Judge to disqualify himself. He erred in failing to do so. These facts were augmented by what took place during the two years while the case was pending.

The Judge did more than simply make rulings in the case. According to the affidavit the rulings were influenced by bias; but even if not biased, they were clearly wrong, and they require reversal and a new trial.

The May 7th plan was appropriately designated as a "Racial Balance Plan." It was within the power of the Board to adopt such a plan, although not constitutionally required, and absent a finding of constitutional violation, it is not within the authority of a federal court. *Swann* v. *Board of Education,* 402 U.S. 1, 10 (1971). In *Swann* the Court stated:

> Our objective in dealing with the issues presented by these cases is to see that school authorities exclude no pupil of a racial minority from any school, directly or indirectly, on account of race; it does not and cannot embrace all the problems of racial prejudice, even when those

problems contribute to disproportionate racial concentrations in some schools. (*Id.* at 23)

The Court further stated:

> If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse. The constitutional command, to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole. (*Id.* at 24)

See also *Milliken* v. *Bradley*, —U.S.— (1974), p. 21 slip opinion; and *Winston-Salem Forsyth County Board of Educ.* v. *Scott*, 404 U.S. 1221 (1971).

Since the Board in the first place was not required to adopt a racial balance plan it certainly had the right to rescind such action if it later determined that such action was inadvisable at the time. The rescinding resolution would merely be neutral action. *Palmer* v. *Thompson*, 403 U.S. 217 (1971); *Ranjel* v. *City of Lansing*, 417 F.2d 321 (6th Cir. 1969), *cert. denied*, 397 F.2d 980, *rehearing denied*, 397 U.S. 1059 (1970). Yet the District Court held that the rescinding resolution was a *per se* violation of the Constitution. This holding finds no support in the decided cases.

Thus in *Swann*, *Winston-Salem Forsyth County Bd. of Educ.* v. *Scott*, and *Milliken* v. *Bradley*, it was made clear that there is no constitutional duty on the part of the Board of Education to balance the races in each and every school in the system regardless of where the children live.

We have ruled to the same effect in *Deal* v. *Cincinnati Bd. of Educ.* [Deal I], 369 F.2d 55 (1965) *cert. denied*, 389 U.S.

847 (1967), *aff'g* 244 F.Supp. 572 (S.D. Ohio 1965); *Deal* v. *Cincinnati Bd. of Educ.* [Deal II], 419 F.2d 1387 (6th Cir. 1969), *cert. denied*, 402 U.S. 962 (1971).

In *Bradley v. Milliken*, 484 F.2d 215 (6th Cir. 1973), *rev'd sub nom., Milliken* v. *Bradley*, —U.S.— (42 U.S.L.Wk. 5249, July 25, 1974), the majority undertook to distinguish Deal I and Deal II on the ground that the District Judges in *Bradley* and *Deal* adopted different findings of fact. This is a real anomaly because our Court approved these inconsistent findings in the appeals therefrom with the result that acts which are constitutional in Cincinnati are unconstitutional in Detroit.

It should be noted also that the three dissenting opinions in *Bradley* v. *Milliken* pointed out a number of other violations of the constitutional rights of the defendants which the Supreme Court did not reach because of its holding that there was no basis for an inter-district remedy.

Whether bound by our decisions in Deal I and Deal II, the majority is bound by the plain language of Chief Justice Burger in *Swann, Milliken*, and *Winston-Salem Forsyth County Bd. of Educ., supra*, relating to racial balance or quotas.

In my opinion the forced busing of black and white children away from their neighborhood schools, to achieve racial balance in each and every school in the system, where eligibility therefor is determined solely by the color of their skin, and over the objection of their parents, is fundamentally wrong and is not required nor even permitted by the Fourteenth Amendment to the Constitution. All that *Brown* held was that it was a violation of the Constitution to exclude black children from public schools attended by white children.

As previously pointed out, the great state of Michigan did not wait for *Brown* to be decided to accord relief to black

children. No black child has been excluded from a Michigan public school for over one hundred years. It was wrong for the Court to treat this case as involving de jure segregation.

It is a well-known fact that many parents of black and white children do not want their children to be forcibly bussed away from their neighborhood schools to achieve a racial balance in each and every school in the system. They do not want their children to be used as pawns to effect an integration of the races, nor for the courts "to attain a social goal [which society has been unable to accomplish] through the educational system by using law as a lever."[3]

It is submitted that the federal courts can act in school cases only to remedy constitutional violations, and that they are not authorized to be used as tools to effect social goals which society has been unable to attain. At the Black Political Convention, held in Gary, Indiana in March, 1972, mandatory busing and school integration were condemned as racist and as preserving a black minority structure.

If it is desirable to effect an integration of the races, we should start with adults rather than with little children. It could not be forcibly accomplished, however, by legislation or by judicial fiat, because our Constitution guarantees freedom of association to all persons. *NAACP* v. *Alabama*, 357 U.S. 449 (1958). Little children are persons.

Black and white children have equal constitutional rights. These rights should not be impinged in order to accord relief to plaintiffs in school cases. The forced busing of white and black children to achieve racial balance can lead only to an unfortunate polarization of the races.

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[3] See dissenting opinion of Judge Weick in *Bradley, supra*, p. 261.

The Board of Education cannot be faulted for the concentration of black people in certain areas of the city. The black people voluntarily moved into these areas long after the school district and attendance zone lines had been established. The Board had no constitutional duty to eradicate the concentration of population. The Board of Education, representing 17,285 school children, was entitled to better treatment than it received in this case. Under our Constitution even the most despicable person charged with a heinous crime is entitled to a fair trial.

In the closing paragraph of *Knapp* v. *Kinsey, supra,* we stated:

> In our opinion, the conduct of the District Judge did not conform to the standard required by the foregoing authorities. Whether unconsciously or otherwise, he failed from the start of the trial to view this case with the impartiality between litigants that the defendants were entitled to receive. (*Id.* at 467).

I would reverse the judgment of the District Court and remand for a new trial before another Judge.